TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~305.~~ 106

MAX. KLINGLER, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED NOVEMBER 23, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 305.

MAX. KLINGLER, PLAINTIFF IN ERROR,

vs.

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1 STATE OF MISSOURI, *ss:*

Be it remembered that heretofore, to wit, on the ninth day of March, one thousand eight hundred and seventy, a transcript was filed in the office of the clerk of the supreme court, held at St. Louis, of the State of Missouri, which is in the words and figures following, to wit:

COUNTY OF ST. LOUIS,
The State of Missouri, sct:

At a term of the St. Louis criminal court, begun and held in the city of St. Louis, within and for the county of St. Louis, on the sixth day of January, the same being the first Monday in said month, in the year of our Lord, one thousand eight hundred and sixty-eight, were present: The Hon. Wilson Primm, judge; Charles P. Johnson, esq., circuit attorney, eighth judicial circuit; William Kreiter, esq., assistant circuit attorney, eighth judicial circuit; Bernard Laibold, marshal of St. Louis County; and Peter P. Dailey, clerk of our said court.

Grand jury.

The marshall of St. Louis County returns here into court the
2 venire facias to him directed, with a panel of grand jurors endorsed thereon, who, being called, come as follows, to wit: James Duncan, who is by the court appointed foreman; Henry Doering, James M. McCausland, William Overbeck, William Weinrich, Fred. Kunzemiller, William Groshow, James A. Monks, John Earickson, Herman Bergesch, August C. Erfort, Horace E. Dimick, Christian Peper, John H. Blood, Samuel Porter, Aaron B. Sluder, Sylvester Freeman, and Conrad R. Stinde; eighteen good and lawful men, who, being duly empannelled and sworn, and having received their charge from the court, retire to consider of their presentments.

MONDAY, *January* 20, 1868.

The grand jury return to the bar and deliver the following indictment as a true bill, to wit:

St. Louis criminal court, January term, 1868.—No. 20.

STATE OF MISSOURI,
County of St. Louis, ss:

Indictment.

The grand jurors of the State of Missouri, within and for the body of the county of St. Louis, now here in court duly empannelled, sworn and charged, upon their oath present, that Max. Klingler, late
3 of St. Louis, in St. Louis County aforesaid, on the twenty-fifth day of November, in the year of our Lord one thousand eight hundred and sixty-seven, at St. Louis, in the county of St. Louis aforesaid, with force and arms, in and upon one Henry Weider, in the peace of the State then and there being, feloniously, wilfully, deliberately, *premately*, and of his malace aforethought, did make an assault, and that he, the said Max. Klingler, a certain pistol, then and there charged with gunpowder and one leaden bullet, then and there feloniously, wilfully, deliberately, premeditately, and of his malace aforethought did discharge and shoot off to, against, and upon the said Henry Weider,

and that the said Max. Klingler with the leaden bullet aforesaid out of the pistol aforesaid, then and there by the force of the gunpowder aforesaid by the said Max. Klingler discharged and shot off as aforesaid, then and there feloniously, wilfully, deliberately, premeditately, and of his malace aforethought, did strike, penetrate, and wound the said Henry Weider in and upon the back of the head of the said Henry Weider, giving to the said Henry Weider then and there with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol
4 aforesaid, by the said Max. Klingler in and upon the back of the head of the said Henry Weider, one mortal wound of the depth of six inches and of the breadth of half an inch, of which said mortal wound, the said Henry Weider then and there instantly died. And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Max. Klingler the said Henry Weider in the manner and by the means aforesaid, feloniously, wilfully, deliberately, premeditately and of his malace aforethought did kill and murder, against the peace and dignity of the State.

WILLIAM KREITER,
Ass't Circuit Attorney.

(Endorsed:) A true bill. James Duncan, foreman. Wit's—Emilie Weider, Bernard Laibold, Regina Weider, and Dr. Spiegelhalter. Filed Jan'y 20, 1868. Peter P. Dailey, clerk.

THE STATE OF MISSOURI
vs.
MAX. KLINGLER. } No. 20.—On indictment for murder.

5 Now, at this day, the said defendant is brought into court, and having had hearing of the said indictment, says he is not guilty as charged therein; and for trial puts himself upon the country; and the circuit attorney doth the like.

FRIDAY, *February* 21, 1868.

THE STATE OF MISSOURI
vs.
MAX. KLINGLER. } No. 20.—On indictment for murder.

Continued for the defendant, as on affidavit, on account of the absence of witnesses.

MONDAY, *March* 23, 1868.

THE STATE OF MISSOURI
vs.
MAX. KLINGLER. } No. 20.—On indictment for murder.

Continued for the defendant, on affidavit, on account of the absence of witnesses of John Klingler.

FRIDAY, *June 5th*, 1868.

THE STATE OF MISSOURI
vs.
MAX. KLINGLER. } No. 20.—On indictment for murder.

6 Continued for the defendant, on affidavit, on account of the absence of John Klingler.

WEDNESDAY, *July* 29, 1868.

THE STATE OF MISSOURI
vs.
MAX. KLINGLER. } On indictment for murder.

Now, at this day, come the circuit attorney, who prosecutes for the State, and the said defendant, in his own proper person, and by counsel learned in the law.

Petit jury.

Thereupon come a jury, to wit: S. K. Raymond, Henry Hugh, W. G. H. Becker, Francis Whitney, Geo. Stiles, Henry Welker, John Brady, George Lunz, Henry Ahlers, Charles L. Spencer, W. S. Bell, and Henry Green, twelve good and lawful men, who, being duly elected, tried and sworn, the traverse between the parties aforesaid well and truly to try, and a true verdict render according to the law and the evidence:

Trial No. 1.—*Conviction.*

Thereupon the trial of the cause progressed and being concluded, is argued and submitted to the jury at twelve o'clock, midnight, who retire to consider of their verdict in the premises, and the court still continuing in session to receive the verdict of the jury, who, at the
7 hour of twelve and one-half o'clock of the morning of the thirtieth day of July, 1868, return into court with their verdict; and, upon their oaths aforesaid, say they find the said defendant guilty of murder in the first degree as charged in the said indictment.

Thereupon the court took a recess until the hour of ten o'clock of this (Thursday) morning.

MONDAY, *August* 3*d*, 1868.

THE STATE OF MISSOURI
vs.
MAX. KLINGLER. } No. 20.—On indictment for murder.

Motion for a new trial and in arrest of judgment filed.

SATURDAY, *August* 8*th*, 1868.

THE STATE OF MISSOURI
vs.
MAX. KLINGLER. } No. 20.—On indictment for murder.

Now, at this day come the circuit attorney, who prosecutes for the State, and the said defendant, in his own proper person, and by counsel learned in the law: Thereupon the motions for a new trial and in arrest of judgment are argued and submitted to the court; and the court,
8 not being fully advised of and concerning said motions, doth take time to consider the same.

MONDAY, *August* 10, 1868.

THE STATE OF MISSOURI
vs.
MAX. KLINGLER. } No. 20.—On indictment for murder.

Now, at this day, come the circuit attorney, who prosecutes for the

State, and the said defendant, in his own proper person, and by counsel learned in the law; and the court now being fully advised of and concerning said motions for a new trial, and in arrest of judgment herein, doth overrule the same.

WEDNESDAY, *August* 12, 1868.

THE STATE OF MISSOURI *vs.* MAX. KLINGLER. } No. 20.—On indictment for murder.

Sentence.

Now, at this day, the said defendant is brought into court, in custody of the marshal, to receive his sentence in pursuance of the verdict rendered against : Thereupon the said defendant being demanded by the court if he hath or knoweth anything to say why the court here should not now proceed to pass sentence of death upon him, and
9 having nothing to say except that which he hath before said, it is, therefore, considered by the court that the said defendant, Max. Klingler, be taken from this court to the place from whence he came, there to remain until Tuesday, the sixth day of October next; thence on that day to be taken to the place of execution, and there, between the hours of ten o'clock in the forenoon and three o'clock in the afternoon of said day, be hanged by the neck until he be dead; and it is further directed by the court that the clerk of this court make out a warrant commanding the county marshal to carry this sentence into execution.

Appeal.

Whereupon the defendant prays an appeal to the supreme court of this State from the said judgment of this court herein rendered against him, and the court here doth grant the same.

FRIDAY, *September* 18, 1868.

THE STATE OF MISSOURI *vs.* MAX. KLINGLER. } On indictment for murder.

Bill of exceptions filed herein by consent.

WEDNESDAY, *September* 30, 1868.

THE STATE OF MISSOURI *vs.* MAX. KLINGLER. } No. 20.—On indictment for murder.

10 *Sentence prolonged.*

Now, at this day, comes the said defendant, and by his attorney files a motion for a stay of execution herein; and for good cause shown by the defendant in his motion to that effect filed herein, the court doth direct that the day of execution of the defendant, which by the sentence of the court was fixed for Tuesday, the sixth day of October, 1868, be prolonged until Wednesday, the twenty-fifth day of November, 1868, on which day, and between the hours specified in said sentence, unless

the supreme court shall otherwise order, the sentence of this court, directing the execution of the defendant, shall be carried into effect.

Judgment reversed.

The judgment having been reversed by the supreme court, and remanded to this court, this cause was again set for trial.

MONDAY, *February* 1*st*, 1869.

THE STATE OF MISSOURI *vs.* MAX. KLINGLER. } No. 20.—On indictment for murder.

Continued for the defendant, as on affidavit, on account of the absence of witnesses.

11 MONDAY, *April* 12, 1869.

THE STATE OF MISSOURI *vs.* MAX. KLINGLER. } No. 20.—On indictment for murder.

Continued for the defendant, on affidavit, on account of the absence of John Klingler and wife.

FRIDAY, *May* 14, 1869.

THE STATE OF MISSOURI *vs.* MAX. KLINGLER. } No. 20.—On indictment for murder.

Now, at this day, come the circuit attorney, who prosecutes for the State, and the said defendant, in his own proper person, and by counsel learned in the law.

Jury in trial No. 2.

Thereupon come a jury, to wit: Jacob Young, Henry Smith, Fred'k Legraine, James Burnside, Isadore G. Mose, John F. Miller, Henry Manester, Charles Kuntz, Joseph H. Conn, Victor F. Cole, Alexander Smithers, and Charles H. Vogel, twelve good and lawful men, who, being duly elected, tried, and sworn, the traverse between the parties aforesaid well and truly to try, and a true verdict render according to the law and the evidence: Thereupon the trial of the cause progressed, and, not being concluded at the regular hour of adjournment,
12 further proceedings are deferred until the meeting of the court to-morrow morning.

SATURDAY, *May* 15, 1869.

THE STATE OF MISSOURI *vs.* MAX. KLINGLER. } No. 20.—On indictment for murder.

Now again, at this day come the circuit attorney, who prosecutes for the State, and the said defendant, in his own proper person and by counsel learned in the law; and the jurors aforesaid also come:

Thereupon the trial of the cause progressed, and, being concluded, is argued and submitted to the jury, who retire to consider of their verdict in the premises.

MONDAY, *May* 17, 1869.

THE STATE OF MISSOURI
vs.
MAX. KLINGLER. } No. 20.—On indictment for murder.

Mis-trial, and continued.

Now again, at this day, come the circuit attorney, who prosecutes for the State, and the said defendant, in his own proper person and by counsel learned in the law; and the jurors aforesaid also come
13 and say that they have exhausted all lawful means to agree upon a verdict herein, and have failed to agree upon a verdict: Therefore it is considered by the court that, counsel for the defendant assenting thereto, that the jurors aforesaid be discharged from the further consideration of their verdict; that the prisoner be remanded to custody, and that this cause be continued.

MONDAY, *July* 26, 1869.

THE STATE OF MISSOURI
vs.
MAX. KLINGLER. } No. 20.—On indictment for murder.

Continued by consent.

FRIDAY, *October* 15, 1869.

THE STATE OF MISSOURI
vs.
MAX. KLINGLER. } No. 20.—On indictment for murder.

Now again, at this day, come the circuit attorney, who prosecutes for the State, and the said defendant, in his own proper person, and by counsel learned in the law.

Petit jury.

Thereupon come a jury, to wit: Thomas W. Rudolph, Charles Wransman, Thomas Jackson, Patrick D. Sage, Jacob T. Acker, Lesley Garnett, John W. McCarty, August Maschmeyer, Thomas M. Clark-
14 son, Frank Schulter, Joseph S. Hale, and William Corrigan, twelve good and lawful men, who, being duly elected, tried, and sworn, the traverse between the parties aforesaid well and truly to try, and a true verdict to render according to the law and the evidence:

Trial No. 3.

Thereupon the trial of the cause progressed, and, not being concluded at the regular hour of adjournment, further proceedings are deferred until the meeting of the court to-morrow morning.

SATURDAY, *October* 16, 1869.

THE STATE OF MISSOURI
vs.
MAX. KLINGLER. } On indictment for murder.

Now again, at this day, come the circuit attorney, who prosecutes for the State, and the said defendant, in his own proper person and by counsel learned in the law: Thereupon the jurors aforesaid also come; thereupon the trial of the cause progressed, and, being concluded, is argued and submitted to the jury, who retire to consider of their verdict in the premises.

MONDAY, *October* 18*th*, 1869.

THE STATE OF MISSOURI
vs.
MAX. KLINGLER. } On indictment for murder.

15 *Conviction.*

Now again, at this day, come the circuit attorney, who prosecutes for the State, and the said defendant, in his own proper person and by counsel learned in the law; and the jurors aforesaid also come, who, being agreed upon a verdict in the premises, on their oaths aforesaid, say they find the said defendant guilty of murder in the first degree, as charged in the indictment.

THURSDAY, *October* 21, 1869.

THE STATE OF MISSOURI
vs.
MAX. KLINGLER. } No. 20.—On indictment for murder.

Motions for a new trial, and in arrest of judgment filed.

SATURDAY, *October* 23, 1869.

THE STATE OF MISSOURI
vs.
MAX. KLINGLER. } No. 20.—On indictment for murder.

New trial overruled.

Now again, at this day, come the circuit attorney, who prosecutes for the State, and the said defendant, in his own proper person, and by counsel learned in the law; thereupon the motion for a new trial herein is argued and submitted to the court, and the court, being fully
16 advised of and concerning said motion, doth overrule the same.

Arrest of judg't overruled.

Whereupon the motion in arrest of judgment is argued and submitted to the court, and the court, being fully advised of and concerning said motion, doth overrule.

Sentence.

Whereupon the defendant, Max. Klingler, being demanded by the

court if he hath or knoweth anything to say why the court here should not proceed to pass sentence of death upon him, and having nothing to say except that which he hath before said, it is therefore considered by the court that the said defendant, Max. Klingler, be taken from this court to the place from whence he came, there to remain until Thursday the sixteenth day of December next; thence, on that day, to be taken to the place of execution, and there, between the hours of ten o'clock in the forenoon and three o'clock in the afternoon of said day, be hanged by the neck until he be dead; and it is directed by the court that the clerk of this court make out a warrant commanding the county marshal to carry this sentence into execution.

Thereupon the defendant herein prays the court to grant him twenty day's time to file his bill of exceptions, which is so ordered to be done.

17 Respite granted to the defendant by the governor of this State until March 17, 1870, in order to take this case before the Supreme Court on a writ of error.

WEDNESDAY, *November* 24, 1869.

THE STATE OF MISSOURI *vs.* MAX. KLINGLER. } No. 20.—On indictment for murder.

Bill of exceptions filed nunc pro tunc, as of October 23, 1869; which bill of exceptions is in the words and figures following, to wit:

In the St. Louis criminal court. September term, 1869.

THE STATE OF MISSOURI *vs.* MAX. KLINGLER. }

Bill of exceptions.

Be it remembered that this cause coming on to be heard and tried in said court, the marshal proceeded to call the jurors summoned in the same, and whilst empan'elling the jury, it was found that one of said jurors, named Andrew Park, refused to take the oath of loyalty prescribed by the constitution of this State, whereupon the said Park was duly sworn to answer such questions as might be propounded to

18 him, and being asked by the court why he refused to take said oath, he stated and declared that, during the late rebellion, he was a sympathiser with the confederate cause, and earnestly desired its success; that these were his opinions and sentiments then; that he thinks so stronger now than he did then; that he was born in the South; that his heart was with the southern cause, and that for these reasons he could not conscientiously take the proffered oath; thereupon the court, of its own motion, discharged the said juror, against the consent and objection of the defendant; to which action of the court, the defendant excepted.

A jury having been elected, tried, and sworn, to try the issue in this cause here, the counsel for the defendant asked and obtained leave of the court to have the defendant taken to a barber's shop for the purpose of having his head shaven at the part where it was alleged he had formerly sustained an injury.

A few minutes after he was brought into court, his head having

been shaven as desired by his counsel, and the examination of witnesses was then commenced.

The State, to maintain the issue herein, on its part introduced
19 as a witness REGINA WEIDER, who, having been duly sworn, testified as follows:

Testimony of Regina Weider.

Henry Weider, the deceased, was my husband. I live in Chotean avenue, No. 2223, between 22d and High streets. My husband was killed there, in the city and county of St. Louis, on the morning of the 25th day of November, A. D. 1867. He was thirty-six years of age. He was a tailor by trade. I have four children by him. My husband's shop was in the front room, down stairs, of his house. The back room was the kitchen; we used it as a sleeping-room. There was a porch between the front room and kitchen. There were four rooms up stairs; Max. slept in one of them. There were stairs leading from the porch, up by the side of the kitchen. I know Max. Klingler; he is my nephew. He came to our house to live with us in the summer of 1867, on June 23d. He came from the old country. My husband, who had learned that Max. knew the tailor trade, wrote for Max. to come out to America, and sent him a ticket and passage money to pay his expenses. He is my brother's son. When he arrived here, he went to work for
20 Mr. Weider in the tailor business. They worked upon the same table. My husband kept two pistols in the house; one a revolver, the other a double-barrel one. He kept the two-barrel pistol in the drawer, in the front room, and the revolver in the beaureau, in the kitchen, where we slept. About three weeks before my husband was shot, the two-barrel pistol was missed, and I did not know what became of it, until I saw it in Max.'s trunk. I told my husband Max. had taken it. On the Sunday before my husband was killed, he and Max. & I were in the tailor shop, and I heard him ask Max. if he had taken the pistol, and Max. said "No." I told Max. that he did steal it; that I saw it in his trunk, and he should not lie about it. My husband scolded him, and he said nothing, but went out. This was just after dinner. My husband gave Max. his spending money, and Max. went away. Max. was not home Sunday afternoon; he did not come on home until about 8 o'clock in the evening, when he walked through the house and went immediately up stairs to bed. I did not see him again until next morning. My husband got up the next morning about six o'clock, and
21 went out into the store to build the fire. About a half an hour afterwards I heard Max. come down stairs, walking heavily. I was yet in bed when he first came down. He looked into my room, through the rear window. He did not say anything, but merely looked in, and went away. There were two back doors to the front room, one leading into the yard, the other onto the porch. (Here a diagram of the premises was shown witness, which she recognized.) About 15 minutes after Max. came down, I heard a shot fired. I jumped up out of bed and opened the door to see what the matter was, when Max. came at me and struck me with a hatchet on the head, wounding me severely. (The scars of the wound were exhibited to the jury.) I struggled with him for some time, and tried to get the hatchet out of his hands. I got back into the kitchen. I said nothing, and he said nothing. His breath was strong, as if he would eat me up. A pitcher falling off from the bureau woke up my daughter Emily, who jumped out

of bed and took hold of Max.'s coat-tail, and pulled him down on the floor. He stopped immediately. I then ran out of the house. I went to the front room, & saw my husband upon the floor. I then went back
22 through the yard to my neighbor's house, and cried for help. I then came back to the house, and found some people there. I spoke to my husband, and said, "Henry, did Max. shoot you?" and he said "Oh," or "No;" I could not say which. I did not see Max. any more, until I saw him in court. We kept some money in the drawer, in the front room. There was about $30 00 in there the day before the homicide, and I did not see it afterwards. We had some two or three hundred dollars hid in the kitchen or bed-room. Max. knew it was there. I saw the pistol a few days before my husband was shot in the trunk where Max. kept his clothes. There was also a can and some powder in his trunk. Mr. Weider kept his money in the drawer, in an account-book. Defendant left his hat that morning. That was in the county of St. Louis. When I ran out, I left the baby in the bed; this bed was pulled out, and the clothes turned over, and on the wall behind the bed there was the mark of a bloody hand. The pocket-book was under the bureau. It had, a few days before, about $600 in it, but my husband had spent some on Saturday.

Cross-examination:

I first saw Max. in June, 1867, when he came to live with us.
23 I did not know him in the old country. Mr. Weider had learned that he was a tailor, and wrote for him to come over to this country, and sent him a ticket and the money to pay his expenses. We were all glad to see him. He went to work with Mr. Weider in the tailor trade. They worked together upon the same bench. Max. did chores about the house—used to sweep out the store, and take down the shutter of the window in the morning. He usually got up after Mr. Weider in the morning. He complained of being sick once or twice. I remember that he staid in bed one morning, and I sent my little girl up to call him, but he said he was sick, and did not get up. Once he complained of a headache. I remember one morning that he came down with a shawl wrapped around his neck, and to the store. He had no quarrel with his uncle or children. He was kind to the children, and to carry the baby about in his arms. He was generally at home nights. The morning that my husband was killed he came down stairs about a quarter of an hour after my husband was up. He walked heavily down stairs, so much so that the stairs creaked. I heard him walking around; heard him go into the store; about 15 minutes
24 after he came down, I heard the shot fired. I heard but one shot, then all was still. I got up and opened the door to see what was the matter, and Max. came at me with the hatchet. He was breathing heavily, and breath smelt bad. It seemed as if he would eat me up. He struck me with the hatchet, and we had quite a scuffle. In the scuffle, a pitcher fell off from the bureau, which woke up my little daughter, who jumped out of the bed and took Max. by the coat and pulled him down, and he stopped at once, and I ran out doors; and that was all I saw of Max. that morning. I went into the store—saw my husband on the floor. I then went out into the back yard—went to one of my neighbors, and called for help. I then came back into the house. Max. was no more there. I went to my husband, and asked him, "Henry, did Max. shoot you?" He said "Oh," or "No," I dont know which; he could not speak so as to be understood. Some people were already there then. The drawer in which we kept our money was *was*

unlocked; we always left it open. Max. used to sell goods sometimes, and had access to the drawer. When Max. came at me with the hatchet,
I did not say a word, nor did he. Not a word was spoken by
25 any one. I remember once some Indians were in that portion of
the city, and used to come in, sometimes, early in the morning. I recollect that once they came in, and Max. was scared. On the morning of the homicide Max. did not take or wear his hat away. My husband used to give Max. his spending money and his clothes, and they had no quarrels. I remember that just after Max. was put in jail, I got a letter from him—it was in pencil mark—it was in German; I could not read it. I don't know what has become of it. (Counsel for defendant asked here to prove the contents of the letter, but it was objected to by the State, and the objection sustained by the court. Defendant then and there excepted.) I am now married again; have been married about seven months. I never had any difficulty with Max.

Testimony of Emily Weider.

EMILY WEIDER was next called on the part of the State, and, being duly sworn, testified:

My name is Emily Weider; I am twelve years old; I live with my mother on Choteau avenue; I know Max. Klingler; I did not see him
shoot my pa; I saw him hit my mother, and I jumped out of
26 bed and pulled him away by the coat, and he stopped at once;
he did not do anything to me; my mother ran away; I did not see in what direction; I ran out there after my mother; I did not see what Max. did; I ran down the back yard, the same way my mother ran; then I came back, and went into the store, where my father was; no one was there but my father, and he lay near the stove; I asked him what was the matter, and he said nothing; I did not see Max. again; my mother came back, and some other people came in.

Cross-examination:

Max. always treated me kindly, and I never had any quarrel with him; he used to play with us, and give us candy; he used to do chores about the house, and carry my little sister, the baby, about in his arms; when I saw him strike my mother that morning, I got hold of his coat and pulled him away, and he stopped at once; did not offer to strike me, and made no further efforts, but ran away; I went out into the store; did not see Max. any more; I heard my ma, when she came back, ask
my pa, "Henry, did Max. sho't you?" and he said, "O! O!" I re-
27 member that Max. was sick once or twice after he came to our
house; I went up one morning to call him, and he was in bed, and did not get up; said he was sick, and had a headache; I heard him complain of headache; I know he used to be afraid of the Indians; he always treated me well, and I never heard my father to have any difficulty with him; they worked together upon the same bench.

Testimony of Dr. Spiegelhalter.

Dr. SPEIGELHALTER, being called, testified as follows:

I am the coronor of St. Louis County; I know the defendant; I held the inquest upon the body of Henry Weider, November 26, 1867; I found the body in bed, and the pillows and sheets saturated with blood; on the back of the head was a hole, through which the blood was oozing; I found that the ball had entered the right parietal bone; had been per-

forated just above the occipital suture. The defendant was present at the inquest. I asked him if he killed his uncle, and he said he did. I asked him why he did it. He said, because they did not treat him right. I asked him if he thought of it beforehand, and the consequences that, if he was caught, he would be hung. He said that he had
28 not thought of it before, but had afterwards. I asked him when he had made up his mind to kill his uncle, and he said the night before. I asked him this to see if he had thought of it beforehand. He appeared very singularly, so much so that I was in doubt in my own mind as to whether he realized his condition. He appeared indifferent and careless; he stated that he came down that morning, and his uncle was at the stove building a fire; that he bid his uncle good morning, but that he made no reply; that he went to work, and opened the shutters of the front windows; that he came back into the store, went out into the back yard, came back into the store again, and without saying a word shot his uncle; that his aunt came towards him, and that he struck her with the hatchet; that he then went away down Choteau avenue to 14th st. depot; that the train came along, and that he got on. I think he said he had a quarrel with his uncle about the pistol on Sunday, after dinner; that his uncle had accused him of stealing the pistol, but he had not.

29 Cross-examination:

The evidence which I gave at the preliminary examination in the court of criminal correction, a few days after the homicide, would be apt to be more correct than that which I could give now as to what the defendant may have said at the coroner's inquest. If I said, in the examination in the court of criminal correction, that "I think I asked him whether he thought over it and the consequences, and, if he were caught, would be hung, and he replied that he didn't think of it before, but meditated on it afterwards; and I think I asked him at what time he made up his mind to shoot his uncle; I think he said he made up his mind the night before," it would be more apt to be correct than what I might remember now. The examination before the court of criminal correction was taken down in writing, and it was shown witness, and he recognized his signature. I would not swear positively that I asked the question, or that he answered them in these very words as I have testified to in this trial. It is my best recollection that I asked the question, and
30 that he answered them. I asked them in the nature of a doubtful question. I was particularly struck with the indifferent manner in which the defendant appeared, so much so that a doubt arose in my mind as to his condition of mind to realize his condition. I thought that he must be morally insane. I was so much impressed with this idea that I asked the questions in order to satisfy myself in that respect, and from his manner, &c., I thought that he did realize the enormity of his crime. I do not regard myself as an expert upon questions of insanity; I have had some experience with the insane; I am familiar with epilepsy; have had patients thus afflicted under my immediate charge; had a boy a few years since under my care who was afflicted with epilepsy, brought on by injuries to the head, which received by a fall when about ten or eleven years old. That patient died a short time after I first saw him. I have examined defendant's head, and I found considerable of a depression across the occipital bone, just below
31 the fontanell.

(A portion of a human skull was here shown witness, which witness recognized as one which he cut from the head of a man who had taken poison, and killed himself.)

I find upon the inner table of this portion of the skull a spicule of bone, which probably pressed upon and irritated the brain until, at last, the man was driven to the act of self-destruction. Epilepsy frequently occurs from blows and injuries to the head, and often results in insanity.

The Dr. was asked his opinion as to the sanity of the defendant, which being objected to upon the ground that no foundation had been laid for the question:

The witness was excused, subject to be recalled after evidence on the part of the defence was introduced.

Testimony of Bernard Laibold.

BERNARD LAIBOLD was called and sworn, and testified as follows:

My name is Bernard Laibold. I know the defendant; I first saw him on the cars of the Pacific R. R., while I was on my way to Fulton with some insane patients. After the train had passed the Gasconade Bridge, the conductor, Mr. Dubois, showed me a dispatch which he had
32 received from St. Louis in relation to the homicide, and that the person who had done the deed might be on board the train. He said there was a boy in the rear of the car that answered the description. I walked back with him, and put my hand upon the shoulder of the defendant, and asked him, Max., where are you going? He said that he did not speak English. I then asked him in German where he was going, and he said to Sedalia. I then said, I arrest you for the murder of those people. He did not say anything, but shook his head. I then took his hands to put the handcuffs on, and, in opening his hands, I found them clotted with blood. He had no hat on. I took him up and sat him down in the rear of the insane patients. I then examined his person and found $4 60 in money; also an account book, with Henry Weider's name upon it. After we got off the cars at St. Aubert station, I walked down with the defendant to the ferry. I asked him why he had killed those people, and he said, Why did I do it? I done it because they did not treat me right. After we got to the Insane Asylum,
33 the defendant asked for something to eat. I then had his clothes taken off, and examined him again to see if he had any more money about him. I found nothing, only his shirt bosom bespangled with blood. The defendant ate a hearty supper, and slept well that night. We then went to the hotel, and he went to bed. I put a handcuff on one of his hands, and one on mine. We slept that way during the night. He ate a hearty breakfast the next morning. We rode back from Fulton to St. Aubert station in a wagon, and waited for the down train. While waiting the mail train from St. Louis came up. I got the morning paper, in which there was a detailed account of the homicide. I showed it to the defendant. It was an English paper. He could not read it, and I explained it to him, and after he heard it he exclaimed, "Well, they can do no more than take my life." I asked him, "Don't you know that they will hang you for it?" and he replied, "They can't prove it." That is about all that he said that I remember of. We did not converse much on the way to the city. I delivered him over to the police, after which I did not see much of him.

Cross-examination:

The defendant had no hat upon his head; and, when I opened
34 his hands to put the handcuffs on, they were yet clotted with blood. He did not seem frightened when I spoke to him, and did not hesitate to tell me where he was going as soon as he understood. He

said he was going to Sedalia. At first he did not talk much, but answered all questions. He made no effort to escape; did not seem to be alarmed at his condition; he was cold going over from the depot to the hotel; he had no hat upon his head, and only the light blouse on; he slept well at night; made no manifestation of uneasiness, or of fright; seemed quite indifferent as to what was done with him; he ate full and hearty meals, and was willing to go along with me. When we arrived at St. Aubert station, the next day, I purchased the St. Louis papers, in which there was a detailed account of the homicide. I looked it over, and showed and explained it to him. He exclaimed, "Well, they can do no more than take my life." He seemed very indifferent as to what was done with him. We did not talk much on our way to St. Louis. When I got to the city I turned him over to the authorities. I saw him a few days afterward in the jail. He gave me a letter to give to
35 his aunt, Mrs. Weider. I read the letter, and remember its contents. I sent the letter to Mrs. Weider through the post office. I did not see it afterwards. I saw a copy of it printed in one of the papers. I do remember that he said in the letter that he would give his aunt $5 00 every fourteen days if she would free him.

(Circuit attorney objected to the contents of the letter being given unless the original was produced. The court sustained the objection. Counsel for defendant then and there excepted.)

I have not the letter in my possession, and do not know what became of it.

The State closed with this witness, and there being no further evidence on the part of the State, the evidence on the part of the defence was introduced.

The counsel for the defence then proceeded to address the jury upon the main features of the defence, and read to them the provisions of the statute in relation to insane persons, and especially sections 43 & 45 of chap. 56 of the Revised Statutes of 1865, pages 311 & '12.

The evidence on the part of the defence was then submitted.

Official letters.

Official letters, certificates, &c., marked Exhibits A, B, C, D, E & F, were offered in evidence, which were objected to by the cir-
36 cuit attorney, and the objection sustained. Defendant excepted to the ruling of the court.

The following depositions were then offered and read in evidence:

Depositions.

Done at Ettenhiem, March 27, 1869, 10 o'clock a. m., before the Grand Ducdom of Baden, domain court, Ettenhiem:

Present, Grand Duke's domain judge, Schrempp, and practitioner of law, Winterer, as sworn actuary, in the case of The State of Missouri, plaintiff, and Max. Klingler, defendant.

This day comes Johann Klingler's wife and presents a letter of the criminal court, in the city of St. Louis, dated November 28th, 1868, with specifications of questions to be put to witnesses to be examined, and requests to proceed without delay with such examination.

Read before me and attested.

(Sign.) BERNHARDA KLINGLER,
nee Kessler.

No. 3119. Order of court.

Johann Klingler and wife; furthermore, Ann Kneuzler, Johann Kneuzler, and Magnus Karle, tailor, are to be summoned, the last named three with certificate that they have been prepared for to take an oath.

37 Grand Duc'l domain court.

(Sign.) SCHREMPP.

Attest:

WINTERER, *Actuary.*

Done at Ettenheim, March 27, 1869, 3 o'c. p. m., before the Grand Ducal domain judge, Schrempp, and P. P. Winterer, as sworn actuary. This day appear Joseph Kneuzler and Anna Kneuzler, present the annexed certificate of having been prepared to take an oath, and after being admonished of the holiness and importance of an oath, and the punishment for perjury, they are duly sworn to testify the truth.

They are examined separately, and state as follows:

Deposition of Anna Kneuzler.

1. ANNA KNEUZLER, nee Hammerstiel, wife of the baker, Martin Kneuzler, from here; 54 years old; Catholic; not related to the defendant; residing at Ettenheim. Ad rem. In answer to questions, witness states as follows:

Max. Klingler, at present in America, and now on trial, son of the laborer, Johann Klingler, here, is well known to me, having lived with his parents in our neighborhood. In the year 1856 or 1857, I do not know that any more exactly, during the time that the defendant, Max. Klingler, went to the public school, he did fall in our barn. I
38 did not see it myself, having been when it happened in my house, but I hastened to the barn immediately after hearing of the accident, and saw there, on the floor, fresh tracks of blood, and in a tolerable large quantity. Max. Klingler was not more there, but I was told—I do not know any more by whom—that his parents had carried him away. Max. Klingler *lied* in bed afterwards, as I have seen myself; his head was bandaged, and he was attended by the late domain physician, Schmidt, but he had already in 8 days recovered so far that he could show himself out on the street. I had not observed that the defendant had, by this fall, suffered a remaining damage to his physical or mental health. I was less able to judge about that, inasmuch as he came only to my house when he had some errand to do for me; he was always willing to do a service; when a boy he was wild and lively as boys are wont to be, but I could not say of ever having heard that he
39 committed a malicious trick. Not having been present myself, I cannot tell from what height the defendant did fall in my barn, but I can state the following circumstances: Before the accident happened sheaves were put in our barn; they were lifted by way of a rope running around a wheel which was placed on the rafter under the roof, and in this manner were the sheaves transferred to the upper part of the barn; the work being finished, my husband, as I have seen, pulled himself the rope up and wound it around the rafter on which the wheel was fastened. After the accident, the rope hung down, reaching the floor of the barn. The defendant probably did fall down in this way; that he unfastened the rope and thereby slipped, or that he slid down

the rope, which unwounded itself quickly, thereby causing him to fall heavy upon the floor; the wheel is fastened about 30 feet high.

Read before me and confirmed.

(Sign.) ANNA KNEUZLER.

Witness dismissed.

Deposition of Josef Kneuzler.

And now comes—

40 2. JOSEF KNEUZLER, married; shoemaker by trade; of Ettenheim; 52 years old; Catholic; no relation of the defendant. Ad rem.

I know Max. Klingler, who at present on trial, very well, as his parents lived formerly in my neighborhood. Some nine or ten years ago, at the time defendant went still to school, it was said that he, defendant, had a fall in the barn of Martin Kneuzler, here; I just stepped out of the house, when the defendant was carried into his parents' house; the late domain physician, Schmidt, was immediately sent for and I saw him frequently enter the house of Johann Klingler; I knew from what other people told me, that the defendant had fallen in Martin Kneuzler's barn, and that he had received an injury thereby, but I cannot recollect to have heard what the nature of this injury was; sometime after—I cannot say how long it took—defendant had recovered and I saw him soon again on the street; I do not recollect having heard from the defendant how the accident occurred; the defendant, after having left the

41 public school at the age of 14 years, went as an apprentice *at* the tailor Karle here; afterwards he went travelling, but came back here; I do not know how long. Defendant was, before the fall, a bright cheerful boy; he appeared to me afterwards more still, quiet, and taciturn, so that I asked myself if this change in his character was perhaps caused by this fall or by his getting older; after having came back here, Max. Klingler showed in his dressing and deportment something singular and strange about him, so that in my house, by myself or my wife or my journeymen, very frequently the remark was made "He is a fool;" I could not say that the defendant had in any other way suffered damage to his physical or mental condition; he belonged to poor people and therefore nobody cared for him; I have not found the defendant to be malicious and not learned that he committed bad deeds among us.

Read before me and attested.

(Sign.) JOSEF KNEUZLER.

Deposition of Magnus Karle.

Furthermore appeared MAGNUS KARLE. Same presents the annexed certificate of the priest, that he is prepared to take an oath, and he was duly sworn, in the same manner the foregoing witnesses had been, to testify the truth.

42 Personalities of witness: My name is Magnus Karle; I am married; tailor; from Ettenheim; 31 years old; Catholic; not related to the defendant. Ad rem.

Questions being put to him, he states:

The defendant, Max. Klingler, was, during 1864, 1865, and in the beginning of the year 1866 with me as an apprentice to learn the tailor's trade. I found him a cheerful, lively, and bright boy, and I never had an apprentice who so quick comprehended as he did; I was satisfied

with his work and also with his behavior, but he was now and then somewhat indiscreet; I have also heard from policeman Haefeler, here, and from comrades of defendant that he was quarrelsome; whenever a little money came into his hands, as was now and then the case, he immediately spent it for drink; this caused me to stop giving him money; I had given him sometimes a sixpence to stir him up to greater activity and industry; after serving out his apprenticeship with me, he left me and commenced to travel, but soon returned, went to work again with me and remained with me until he emigrated to America; during
43 defendant's staying with me as an apprentice, once he mentioned that he did fall in Martin Knezler's barn; he made only a short mention of this accident, laid no stress upon it, and did in particular not say that he had any injury suffered or otherwise damage received by it; I considered him physically as well as mentally healthy, and did never hear from others that he had received a remaining injury from said fall.

Read before me and confirmed.

(Sign.) MAGNUS KARLE.

No. 3132. Order of court.

To the criminal court of St. Louis:

We send you the record of the testimony and remark to it, as follows:

We have examined the witnesses in accordance with our regulations, and had to abstain from swearing in the defendant's parents, such not admissable with us. What regards the witness Joseph Kneuzler, so is he evidently the intended witness, the mistake in the name having occurred in St. Louis, as there is no Johann Kneuzler here.

Concerning our authority for taking sworn testimony of witnesses, we give you the assurance that the Grand Ducal domain courts in Baden are empowered to do so.

(Sign.) SCHREMPP.

44 [L. S.] Attest:

WINTERER.

Certificates.

I certify that Magnus Carle, tailor, from here, has been prepared for the importance and holiness of an oath.

Ettenheim, March 27, 1869.

(Sign.) GUTGESELL, *Priest.*

Joseph Kneuzler and Anna Kneuzler, both from here, were to-day instructed of the importance and holiness of an oath.

Ettenheim, March 27, 1869, the Catholic priest's office.

(Sign.) KERN, *Vicar.*

Depositions of Johann Klingler and his wife were taken, they not having been sworn the first time, as follows, to wit:

Done at Ettenheim, June 24, 1869, 11 o'cl. a. m., before Mr. Schrempp, Grand Ducal domain judge, and P. P. Winterer, in the case of versus Max. Klingler, of Ettenheim, charged with murder.

In accordance with a requisition from the criminal court in St. Louis, dated June 1, 1869, and a list of questions to be put to Johann

45 Klingler and his wife, of Ettenheim, these two persons were summoned at once. They presented the annexed certificate of the officiating priest that they had been prepared to take an oath; after having them informed of the sanctity and importance of an oath, and the punishment for purjury, they were lawfully sworn in. They were then separately put on the witness stand and gave the following testimony, to wit:

Deposition of Johann Klingler.

JOHANN KLINGLER.

My name is Johann Klingler; am a married citizen and day laborer at Ettenheim; 49 years old; Catholic. The defendant, Max. Klingler, is my son. He was born in December, 1849, at Ettenheim, and emigrated on the 26th of May, 1867, to America. Since that time I have not seen him. My son Max. was 11 or 12 years old when he fell in Martin Kneuzler's barn from a height of about 30 feet. I was at that time threshing in another barn, and was called home after the accident had already happened. When I reached my home my son Max. had already been brought there. He had lost his consciousness, and *bleeded* out of his mouth and head. He had several wounds on his head espe-
46 cially on the back of it. Of the nature of the wounds I cannot state any details, having left their examination to the doctor, who had been called—county physician, Schmidt. My son, the defendant, had, on account of his wounds, to lay in bed for five weeks, during which time the before-named physician, who lives no more, treated him. As soon as the defendant had recovered so far, to be able to leave the bed, he was also permitted to go out. During the time of medical treatment Dr. Schmidt called my and my wife's attention that the injuries were of such a kind as to make the defendant suffer a permanent damage from it. In what this damage would consist he did not say. About a year after the fall the defendant commenced to have epileptic attacks. They came repeatedly from time to time, and may have come from six to eight times a year. The defendant was subject to them at the time he emigrated to America. In the epileptic fits the defendant dropped down, rolled his eyes, twisted his limbs, and foamed from out his mouth. Such attacks lasted from one-half to three-quarters of an hour. As far as I know these fits came only during the day time; not at night.
47 Being over, the defendant could immediately eat or work. After the accident the defendant often complained of headache. This was, in particular, the case during bad weather. He did not suffer from such headache and epileptic attacks before the accident. I cannot recollect having heard from defendant in which way he was attacked by these epileptic fits, and what effect they had on him. The accident happened, as he told me, in the following manner: In Martin Kneuzler's barn a rope was fastened on the roof, by which the grain was hoisted. The rope run over a wheel. It was, on the day of the accident, drawn up. Defendant intended to let it down, and fell in reaching out to grasp it. In falling he struck on his head; and the fall must have had the more bad effects, as he fell upon stone flooring. The defendant was, when a boy, and also later, of a good disposition. He always got along well with his eight brothers and sisters, his comrades and acquaintances. During his boyhood he had to guard my smaller children. I could not say that he had thereby done anything wrong. His behavior was good; bad or malicious tricks could not be told

of him. I have not observed that defendant's reason had suffered on account of the accident; neither can I say that a change had taken place in his disposition and his behavior after the accident. In company he was always lively and cheerful. He was, after having become 14 years of age, attacked by nervous fever, and was prostrated for fourteen weeks. After this time, it took long until he fully recovered from this nervous disease. The defendant had learned the tailor's trade. The husband of my sister Regina, who emigrated to America, named Hendrich Weiter, being also a tailor, he (meaning the defendant) wrote to them (meaning Weiter & his wife) and asked them if he should come to them. This was not only answered in the affirmative, but he even received from them the money for his passage to America. I do not know if my sister Regina or her husband had been informed that the defendant suffered from epileptic fits. I, for one, did not do it. Defendant was, with the exception of the illness mentioned by me, always well. The defendant has observed a moral conduct, was peaceful, and had no quarrels with neighbors and acquaintances.

During the time of his apprenticeship as a tailor he gave the little spending money he received from his boss to his mother, as soon as he heard from her that she was in pecuniary trouble.

Read before me and certified to be correct.

(Signed) JOHANN KLINGLER.

Deposition of Bernharde Klingler.

And now appear JOHANN KLINGLER'S wife, and states:

My name is Bernharde Kessler; am the wife of Johann Klingler, citizen and day laborer from here; 48 years old; Catholic. I am the mother of the defendant, but have eight children besides. Defendant was born in the year 1849, a fortnight before Christmas. With his sixth year, he went to school, and visited it until he had become 14 years of age. After having left the public school, he became an apprentice with the tailor, Magnus Karle, and stayed with him not only during his two years' apprenticeship, but even half a year after. He fell, in his eleventh year, in Martin Kneuzler's barn, 35 feet deep. It is there the grain rope on a small wheel fastened above on the roof. My son, the defendant, intended to let this rope down; but he, in reaching towards it, tumbled down and fell between the hog pens, which was in the barn. I was called after he had fallen. When I arrived in the barn, he was lying senseless between the two hog pens, and had two wounds on his head, out of which he bleeded. The one was one on the forehead, the other on the back part of the head, which had been pressed in by the fall. The wounds were deep and wide open. The height from which my son tumbled down was, as already stated, a great one, but the fall must have had the greatest effect in consequence of the flooring on which he fell being stone paving. It took three to four days till defendant recovered his senses. He had to remain in bed for four weeks, and it took two more weeks till he had recovered so far to be able to go to school. Immediately after the fall, county physician, Schmidt, from here, was called. He treated him during his illness. He then already called my attention to the accident likely to have a permanent injurious effect on the defendant, but without explaining it more direct. After the defendant had recovered, the back part of his head was, as a remaining effect of the fall, somewhat pressed in, and one of his eyes had received a somewhat changed position. About a

51 quarter of a year after his recovery, the defendant had an epileptic fit. He had afterwards often such attacks. They came again in from 6 to 8 weeks; sometimes it was even a half a year till such an attacks occurred. These attacks came mostly in the morning. I cannot recollect him ever having had one during night time. During such fits he hollered, twisted his arms, and rolled his eyes; froth came out of his mouth and nose, and he dropped down. If left alone, he, in a quarter of an hour, came to himself again, but, if touched, and trying to raise him up, it sometime took two hours before the attack passed off. These fits announced themselves already several days before hand by a heavy headache, and defendant became already frightened when such was the case, because he expected such an epileptic attack coming again. Previous to the fall was subject neither to epileptic fits or headache. About a year afterwards, defendant was taken down with nervous fever, and suffered from it 14 weeks. When I reported the first epileptic attack to the county physician, Schmidt, he said
52 he could have told me that in advance, that the fall would have such an effect, but that he had not done so, because he wished not to frighten me. He stated at the same time that physicians could not prescribe anything for those epileptic attacks; but it were to be hoped that they would by and by cease by themselves. He said it was possible that a shock might terminate them. Physician Schmidt lives not more. The defendant, when a boy, had to watch my smaller children, and he has done that with great care; he, in general, got along with his brothers and sisters, as also with the neighbors and acquaintances, and I have never heard that he had been mixed in quarrels and fights. When he was an apprentice at the tailor's trade, he once and a while shared with me the spending money he received as soon as he knew that I was in pecuniary trouble. Defendant was in general of good disposition and cheerful. He associated with his comrades like other young men. To my knowledge, no other change took place in his character and behavior as is brought on by becoming older. I never observed on him low spirit or particular strange behavior. My sister Barbara Kessler, in Herbolzheim, has a daughter, Theresia, who
53 suffers already since her 14th year from epilepsy. My sister Magdalena, who emigrated to America already nearly 15 years ago is subject to this disease. My mother was Josepha Keppner, of Herbolzheim. Her sister Barbara Keppner, who was married to Bernhard Mutschler, of Herbolzheim, had a daughter named Stephanie, who died a lunatic in the insane asylum at Illenan. The sister of Steffanie Mutschler, named Barbara Mutschler, of Herbolzheim, suffers likewise from insanity, and I heard that the physician who treats her demands her removal to the lunatic asylum at Illenan. The defendant was born here, and left two years ago for America. Until that time, and with the exception of half a year, he was always here and under my eyes. Regina Weiter and her husband were not informed by us that the defendant was subject to epilepsy, as we thought that a change of climate might possibly cure him from this sickness. In response, I have nothing further to state.

Read before me and certified to be correct.

(Signed) BERNHARDA KESSLER.

In conclusion, is herewith recorded, that the undersigned Grand Ducal domain judge, Schrimpp, is entitled, by power of his office, to conduct examination and to swear witnesses.

54 No. 5688. Order of court.

This depositions are to be sent, with list of questions attached, to Mr. W. H. H. Russell, St. Louis.

Gr'd Ducal domain court.

(Signed) SCHRIMPP.

Attest: WINTERER.

The Grand Ducal domain court, Ettenheim, to the Catholic priest's office, Ettenheim. In the case of vs. Max. Klingler, of Ettenheim, on account of murder. No. 5679.

We request you to instruct Johann Klingler and wife of the holiness and importance of the oath, and to issue to them a certificate thereof.

Ettenheim, June 24, 1869.

(Signed) SCHRIMPP.

The instruction in reference to the oath was given to-day.

Ettenheim, June 24, 1869, Catholic priests' office.

(Signed) KERN, *Vicar.*

Testimony of Dr. Speigelhalter.

Dr. SPEIGELHALTER was then recalled and examined. He testified as follows:

When I asked the defendant the question, "if he had thought
55 of it beforehand, and when he had made up his mind to kill his uncle," I was in doubt as to his mental condition. I meant when I said so that I thought that he did not seem to realize his position and the enormity of the act he had perpetrated; that there was a lack of education or moral training. I did not mean to say that he was crazy. I do not regard myself as an expert upon questions of insanity. I am more familliar with epilepsy.

(An examination of the piece of skull, and the effect of injuries upon the head and brain, was here entered into, but it not being written down is difficult to remember.)

I do remember of having told you of Mr. McDonald, that I had something (meaning this piece of skull) which would clear Max. Klingler. The depression upon the defendant's head, if caused by a fall and fracture, might probably result injuriously to the brain and the mental faculties, and might lead to epilepsy and insanity. I have known of such cases, and had them under my immediate observation and treatment. The case of the boy which I mentioned, who fell when a lad of about 11 years old, and in a year or so became subject to epileptic fits, and finally died at the age of 18 years, *which*, under my
56 treatment. Such cases frequently occur.

Redirect examination by the circuit att'y:

Wounds and injuries do and may occur to the head without injuring the mental faculties. I have known of such cases. Epilepsy may occur in persons, and that they afterwards recover and manifest no mental impairement. And, again, the fits may occur at irregular periods, and the person between the intervals be apparently perfectly healthy. I have known of such instances. In a convulsive fit of epilepsy the patient is harmless and usually prostrated.

Testimony of J. K. Bandny.

Dr. J. K. BANDNY was called on the part of the defence, and, after having been first duly sworn, testified as follows:

Q. What is your name in full?

A. Jerome K. Bandny.

Q. What is your occupation?

A. I am a physician.

Q. Have you made the subject of epilepsy and insanity a speciality?

A. I have.

Q. Are you the physician of any particular institution?

A. I am the physician for St. Vincent's Insane Asylum, in this city.

Q. How long have you been with that institution as physician?

57 A. About 5 years.

Q. You are frequently subpœned in the county court as a witness in cases of insanity?

A. I am.

Q. How many insane patients, on the average, has there been under your charge and observation per day?

A. About 130.

Q. How many epileptics?

A. About 10 or 12 daily; sometimes more and sometimes less. I am familiar with the different phases of epilepsy, insanity, and epileptic mania.

Q. Dr., may it not be said, almost without fear of making a mistake, that if a person suddenly commits murder without any previous intellectual disturbance, without, up to that time, having shown any symptoms of insanity, and if not under the influence of passion, alcohol, or any other poisonous substance which acts on the nervous system, that the man is afflicted with epilepsy?

(Objected to, and objection sustained.)

Q. Will you give us your definition of epilepsy?

A. It is a convulsive form of disease, attended by loss of consciousness, and with spasms. The patient falls down suddenly and

58 loses all consciousness, becomes blue in the face, foams at the mouth, &c. The characteristic feature is complete loss of consciousness. There are other forms, in which the patient has no convulsions. If he receive the fit standing or sitting he will remain in that position. Mental habitude, and frequently delirium, follows from this form of disease.

Q. What is the condition of the patient during a fit of epileptic delirium or furor?

A. During the delirium the patient is maniacal, furious, enraged, and prone to the committal of great crimes.

Q. They are known, then, to commit crimes in that condition?

A. Yes, sir.

Q. What kind of patients are regarded as the most dangerous in the insane asylum?

A. Epileptics.

Are epileptic fits known to occur in the night time?

A. Very frequently there is what is known as nocturnal epilepsy, which is a very usual form.

Q. How long may the delirium or furor last in epileptic convulsions?

A. For a few minutes—one to fifteen.

59 Q. And during that delirium, persons do, and frequently, become very dangerous and violent?

A. Unquestionable.

Q. Suppose a person afflicted with nocturnal epilepsy should, in the delirium of the fit commit a crime; would he, in a medico-legal point of view, be regarded as responsible?

(Objected to and objection sustained.)

Q. Will you please examine the head of defendant? (Dr. examines the head of the defendant.)

Q. What do you find upon examination?

A. I find a depression near or at the junction of the parital bone with the occipital bone, near the superior angle; the depression is quite deep and well marked with a sharp projecting bone, which has the appearance of being caused by a fracture; the depression is very evident to the finger, and if caused by an accident, must have been a severe injury.

Q. What position of the head is regarded as the most critical as to the nervous system?

A. The base of the brain.

Q. If the depression was produced by a fall and injury, what
60 would be the probable effect upon the brain and mental faculties?

A. There could be a series of bad consequences; epilepsy would be very apt to occur sooner or later; epilepsy would be one of the most common results; in fact, any insidious disease of the brain might follow it, might produce cerebral congestion.

Q. The most probable result then would be—

A. Epilepsy.

Q. Have you had such cases under your treatment?

A. I have; I had one under my care at the asylum who was a confirmed epileptic in consequence of a fall in early childhood, and he finally died from the effects of it.

Q. How do those fits occur as to time and circumstances?

A. There is no definite period for the manifestations of the paroxisms, they may occur a number in a day, once a week, month, or once in a year, or once in a lifetime.

Q. Dr., suppose there was an heriditary taint of insanity in the patient, what would be the probable result of the blow, taken
61 in connection with the heriditary taint?

A. There would be a strong predisposition to epilepsy; it would render the danger of the occurrence of the disease triple.

Q. Dr., many a person afflicted with epileptic mania possess his judgment a moment before the delirium and a moment after, and yet, at the very moment of the delirium be entirely unconscious of what he does?

A. As a general rule, previous to the epileptic paroxism, there is a perfect integrity of the intellect, yet at the moment of the paroxism, total unconsciousness.

Q. Is it not from this fact that epileptics are often regarded as responsible, when, as a fact, they are morally irresponsible?

A. Yes, sir; after a fit they are in a condition of mind in which there is no responsibility, and they should not be held accountable.

Q. Dr., are there cases where persons may be engaged in mercantile pursuits of a general character, and yet be subject to epileptic fury?

A. Yes, sir.

62 Q. May not the reason of a patient thus afflicted remain in a perturbed condition for some time after the fit and it not be remarked by a casual observer?

A. Yes, sir; and there are cases where the person, during the fit may

retain enough of reason to appear free, as for instance, in epileptic vertigo.

Q. What is the distinction between epileptic vertigo and the ordinary form of epilepsy?

A. It is this: in epileptic vertigo there are no convulsions, and the patient does not fall down.

Q. Are certain and irresistable impulses of usual occurrence during an attack of epileptic vertigo, and pretty frequent during a regular convulsive?

A. Yes, sir.

Q. And during these impulses the person may perpetrate great crimes?

A. Yes, sir.

Q. And yet, a few moments before the criminal act and a short time after, the patient possess his mental faculties?

A. Yes, sir.

63 Q. Can a person have a true epileptic attack without any convulsions?

A. Yes, sir; epileptic vertigo.

Q. Are epileptic attacks frequent at night?

A. Yes, sir.

Q. May and do not halucinations follow those attacks sometimes?

A. Yes, sir.

Q. What are the existing predisposing causes of epilepsy in this case, if he has epilepsy?

A. The existing causes would be the fall and injury he sustained in childhood; the predisposing cause would be the hereditary taint in the family, if there was any.

Q. Is it possible to give the frequency of epileptic fits?

A. It is difficult to give any definite rule; they may occur at very irregular intervals, sometimes months and years apart.

Q. Is it not a fact that epileptics are easily irritated and often commit violent acts, which in most cases have not the excuse of provocation?

A. Yes, sir.

Q. What of all symptoms of epilepsy is the most characteristic?

64 A. Loss of consciousness.

Q. What is generally the mental condition of the epileptic after a paroxism?

A. A state of depression of the intellectual faculties.

Q. Do not the furious impulses occurring during a fit of epilepsy often lead to the perpetration of the most startling and horrid deeds?

A. Yes, sir; no patients are more dangerous and vicious.

Q. Is there not an instinctive and blind violence which the patients cannot resist?

A. Yes, sir.

Q. Do not medical authorities lay particular stress upon that fact?

A. Yes, sir.

Q. May not persons in that state commit fearful acts and not be conscious of it at the time?

A. Undoubtedly.

Q. Is not epileptic delirium eminently impulsive and spontaneous?

A. That is the general characteristic of the disease.

Q. How does epilepsy usually affect the faculty of memory?

A. It generally impairs the memory.

65 Q. Dr., I believe you stated that epilepsy might exhist for years in a person and it not be revealed to the popular eye?

A. Yes, sir.

Q. When it has existed for any considerable length of time in a concealed form, is it not apt to break out in a sudden impulse, or violent act and with renewed impulse both in a convulsive and a delirious form?

A. Yes, sir.

Q. When the defendant has been undeniably subject to fits of epilepsy, should he not have the benefit of every reasonable doubt that might arise as to his sanity?

(Objected to by the circuit attorney, and objection sustained on the ground of incompetent and irrelevant question. Exception to ruling of court.)

Q. Dr., will you please give us your definition of insanity?

A. It is now conceded to be a disease of the brain produced by different causes and effects.

Q. What are the predisposing causes of insanity?

A. Hereditary traits, injuries to the brain, epilepsy, and all diseases of the nervous system.

66 Q. What is the probable mental condition of the offspring of insane parents or ancestry?

A. They are apt to become dangerous and delirious upon sudden excitement or injury.

Q. Is not insanity hereditary?

A. It is.

A. Is there not a strong tendency in the offspring of insane parents or ancestry, to become insane?

A. Certainly.

Q. Are not the children of insane people more easily disturbed in mind than the children of healthy people?

A. Undoubtedly.

Q. Dr., if any hereditary disease prevails on the maternal side, is it not more apt to appear in the offspring than if it prevails on the paternal side?

A. It is, as a general rule.

Q. May not insanity exhist for a considerable length of time and not be revealed until some sudden outburst?

A. Yes, sir.

Q. Is it not often the case that persons become insane?

A. Yes, sir.

67 Q. Are not hereditary taints of insanity often cause of sudden outbreaks?

A. Yes, sir.

Q. Dr., may we not assume, almost to a certainty, that if a boy who has borne a good reputation for peace and quietness, of a generous disposition, belonging to a religious society for the promotion of piety and peaceful behavior, suddenly kills a relative (an uncle) with whom he never had a difficulty or quarrel, and without any prevailing motive, that he is insane?

A. We might safely infer that he was not of a sound mind.

Q. May not a person be subject to paroxisms of insanity and immediately before and after the attack be in apparently a sane state of mind?

A. Yes, sir; instances of that kind are known in what is called transitory insanity.

Q. May not persons be subject to paroxisms of insanity and yet have lucid intervals?

A. Certainly.

Q. Dr., if there is *no* hereditary taint of insanity, is not homicidal mania more or less likely to occur than if there was no hereditary
68 taint?

A. Yes, sir; it is a strong provoking cause.

Q. Dr., what effect have these paroxisms and sudden outbreaks of insanity upon the moral feelings of the patient?

A. The moral feelings are for the time being obliterated.

Q. Is it possible for the patient to be conscious or possess a clear understanding?

A. Quite impossible.

Q. Dr., are not some of the insane more apt to attack their relatives and kin than strangers?

A. Yes, sir; this is frequently the case in epileptic mania.

Q. Dr., from your observation and experience, have you not known of insane persons who would converse rationally in one moment, and in the very next go into a paroxism of insanity?

A. Yes, sir; that is frequently the case.

Q. Do they not go from one extreme to another?

A. Yes, sir.

Q. Have you not known them to be insane one moment, sane in another, and then insane again?

A. I have.

69 Q. Do you not have billiard rooms and dancing halls in the asylums for their amusement?

A. Yes, sir.

Q. Are not epileptics, who have become insane therefrom, regarded as the most dangerous in the asylums?

A. They are.

Q. Is it not a fact that insanity often follows from epilepsy?

A. Yes, sir.

Q. Dr., if a person should fall, at the age of 11 years old, a distance of 30 feet, and fracture the skull, from the effects of which he was unconscious for three days, and was confined to his bed for four or five weeks, and then, about a year after, became afflicted with epileptic fits, and some headache, which he never had before the fall, what would be your opinion as to the causes?

A. The injuries to the head.

Q. If the person should become insane who had thus suffered, would you not attribute the insanity to the injuries and the epileptic disease?

A. Most assuredly.

Q. May not a person wounded or injured upon the head live for years in the apparent enjoyment of his mental faculties, and then all of
70 a sudden lose his mind, and be unable to distinguish between right and wrong?

A. Instances of that kind are known when the person has never been known or suspected of insanity, yet the disease manifest itself in a single act.

Q. Are not cases of insanity actually observed, in which an attack of mania suddenly comes on and soon passes away, so that, although there is no real epileptic fit, one can scarce avoid looking upon the attack of mania itself as a sort of epilepsy?

A. Yes, sir; such cases are known to occur.

Q. What is mania transitoria?

A. It is a sudden paroxism of insanity during which the patient may be furious, and frequently kill his dearest friends or relations, and yet a few moments before and a few moments after the act be in the apparent possession of his reason.

Q. Is this form of insanity a new or an old doctrine?

A. It is a well-founded theory in all medical jurisprudence, and may not be considered a new theory, and is well recognized by all
71 *phycological* authorities in the management of persons who have committed acts which would have otherwise been considered crimes, and for which they would have otherwise been doomed to death on the scaffold.

Q. Does there exist, *exist*, then, instant'eous changes in the mental faculties that are known as instantaneous insanity?

A. Yes, sir.

Q. And those changes may have their first and only manifestation in a simple act of qualified crime; that is to say, without preceeding symptoms, without causes near or remote, appreciable to the world, and bursting out as suddenly as a clap of thunder, and ceasing completely with a single criminal act?

A. Certainly; such cases occur.

Q. What is the characteristic effect of transitory mania in its after consequences?

A. First, the act of violence; second, the immediate return of reason.

Q. And hence, doctor, the very first overt act of insanity may be the homicidal act?

A. Yes, sir.

Q. Do you regard yourself a medical expert upon questions of insanity and epilepsy?

72 A. I regard myself as an expert upon insanity and epilepsy.

Q. Have you heard the evidence, and are you familiar with the facts in this case?

A. I have heard most all the evidence.

Q. Do the facts, in your opinion, indicate insanity?

A. They do.

Q. From the evidence, then, and what you know of the case, what is your opinion, as a medical expert, as to the sanity or insanity of the defendant at the moment of the homicide?

A. Honestly and conscientiously within my own mind, I do not believe him to have been in his right mind at the time of the act; I do not believe he was sane.

Q. It is your opinion, then, that he was insane at the time of the homicide?

A. It is.

Cross-examination by the circuit attorney:

Q. Dr., how long have you been practicing medicine?

A. About 8 years.

Q. How long have you been in charge of St. Vincent's Insane Asylum?

A. About 5 years.

Q. How long have you known the defendant?

73 A. Since I was first called as a witness in this case, little more than a year ago.

Q. How often have you seen him during that time?

A. Not more than three or four times, as I saw him in court here, and once in prison.

Q. Did you ever see him have a fit of epilepsy?
A. Never did.
Q. Did you ever know him to have one?
A. Not to my own knowledge.
Q. And yet you say it is your opinion that he was insane at the time of the homicide?
A. Yes, sir.
Q. Dr., you say this fit of epilepsy is preceded by indications of its approach?
A. Sometimes it is, and sometimes it is not.
Q. What are the indications of its approach?
A. In a medical phrase, there is the aura, which is a species of sensation, a nervous sensation, sometimes irritability, peevishness, fretfulness, &c.
Q. Does the patient generally recognize the fact of its approach?
A. Yes, sir; some authorities have cases where the patient has felt its coming on, and requested to be locked up for safe-keeping.
74 Q. That has an effect upon the system?
A. It has the effect of accelerating the attack.
Q. How long do the indications precede the attack?
A. It may be a few seconds, or it may be a few days; there is no definite period.
Q. When the attack comes on how long does it last?
A. A true form of epileptic fit does not last over 4 minutes, perhaps on the average not over a minute and a half.
Q. That is one of the stages in which they lose their consciousness?
A. Yes, sir.
Q. State the characteristics of the epileptic fits?
A. *Three* are three forms, epileptic convulsion, epileptic furor, and epileptic vertigo.
Q. In all these the patient is unconscious of his own action?
A. Yes, sir.
Q. How long do the fits generally last?
A. Usually a minute or two; sometimes five minutes, and it might be fifteen minutes.
Q. The subsidence of the fit is generally followed by general
75 bodily prostration and muscular relaxation, is it not?
A. Yes, sir; but during the fit, if epileptic furor be the form, the patient can perform wonderful feats of strength.
Q. What is the effect on the patient's memory in a fit of epilepsy in either one of its three forms?
A. It impairs the memory.
Q. The patient does not remember what he did?
A. He is not apt to remember; may have some incoherent ideas of what he did; it would occur to him something like so'nambulism.
Q. A faint indistinct impression?
A. Yes, sir.
Q. Are the reasoning powers sufficiently active and alert?
A. Never during the existence of the paroxism; the patient acts spontaneously and impulsively, like an animal, a mad dog.
Q. Do you know of a case where an epileptic has deliberately carried out a preconcerted plan?
A. In insanity I have; in epileptic furor their acts are more like those of animals, not influenced by reason and judgment, but a
76 sort of impulse to the commission of certain acts.
Q. The will is subservient to the impulse that springs up in the brain?

A. The will is decide'ly remote.

Q. And the will performs the impulse instantaneously?

A. And instinctively.

Q. Epilepsy does not always permanently injure a man, does it?

A. As a general rule it does.

Q. It does not necessarily incapacitate them for the ordinary duties of life, does it?

A. That depends to a great extent as to the nature of the attacks; epileptic vertigo is considered to be more dangerous to the mind than the convulsive form.

Q. Paroxisms that manifest themselves in virtigo are the same in their effect on the consciousness as the other paroxisms, are they not?

A. Substantially the same.

Q. Virtigo is more severe upon the mind?

A. It is, in its destructive effects.

Q. It produces a gradual assault upon the brain, a prostration of the mental faculties?

A. Yes, and sometimes imbecility.

Q. How often do the fits occur on patients?

77 A. The tendency is to increase, but there is no general rule as to duration.

Q. You have seen persons who were insane from epilepsy?

A. Yes, sir.

Q. It requires considerable of an assault of epilepsy on the brain to overthrow the reason, does it not?

A. No, sir; the destruction is this: That most of the cases have varied effects, but the general tendency is to impair the memory and reason; in those cases where the delirium is transcient, it is difficult to determine the effect upon the reason, that is as to permanent effect, but while it does last the reasoning faculties are completely dethroned.

Q. It does not, however, necessarily disqualify a man from business?

A. No, sir; as I said before he may carry on the ordinary nature of mercantile affairs and his condition not observable.

Q. Don't it require a continuous onslaught on the brain by epilepsy to entirely destroy reason?

A. Yes, to entirely destroy reason?

Q. Suppose a person were to have a fit of epilepsy every 6 months or one every month, how long before he would become entirely insane?

78 A. That is a difficult question to answer, and cannot be positively because it depends upon whether there were any predisposing causes, as for instance an hereditary taint?

Q. Would it take a long while?

A. It might and it might not.

Q. Where it occurred from a blow upon the head, and epilepsy did not occur more than once in six or seven years, and no indications afterwards, do you think that man would stand a good while before coming insane?

A. Yes, if there was a decided distance between the attacks, but there might be nocturnal epilepsy.

Q. Dr., what distinction do you make between epilepsy and epileptic mania?

A. Why, in simple epilepsy, that is, in convulsive form, the patient is harmless and falls usually and remains prostrate; in epileptic mania the patient is furious and very frequently dangerous, and may commit acts of violence and crime.

Q. What is the distinction between epileptic mania and mania transitoria?

79 A. In epileptic mania there is usually a paroxism or a distinctive feature of some previous disorder, while in mania transitoria it is generally spontaneous and of quick irris'table nature.

Q. Epileptic mania, then, Dr., is a disease of the mind that may be produced by epilepsy?

A. Yes, sir.

Q. And some persons have epilepsy and are never afflicted with epileptic mania?

A. Yes, sir.

Q. It is simply a consequence of a continuous attack of the simple form of the desease epilepsy?

A. Yes, sir.

Testimony of Dr. Gavarett.

Dr. GAVAREET was next called and sworn as a witness on the part of the defence, and it was agreed that he would testify substantially the same as Dr. Bandny. This question was propounded by the counsel for the defence:

Q. Have you heard the evidence in the case, and are you familiar with the facts?

A. I have heard most of it, and I am somewhat acquainted with the facts?

Q. What is your opinion, as an expert, as to the sanity of the

80 defendant at the time of the homicide?

(Objected to by the circuit attorney, and the objection sustained by the court.)

Q. Dr., you are familiar with insanity in its different phazes, and consider yourself an expert upon the subject of insanity and epilepsy?

A. Yes, sir. I think I am.

It having been agreed that the Dr. would corroborate Dr. Bandny in his evidence, he was excused.

Testimony of Dr. Louis Bauer.

Dr. LOUIS BAUER, sworn and examined on the part of the defendant, testified as follows:

I am a practicing physician and surgeon, and reside in the city of St. Louis. I am president of the College of Physicians and Surgeons of St. Louis. I have had considerable experience in the treatment of epileptic and insane patients. I have examined the head of the defendant here in court, and find that he has quite a depression on the back part of the head where the occipital bones meet, near the fontanelle. It is not an extraordinary depression. It is smooth and even; not edged, abrupt, or pointed. I cannot say, from inspection, whether it is congenital or whether it has been caused by violence. There is no scar there indicating it as the result of injury on the head. It would be

81 impossible to tell, from mere examination of the depression, how it was caused. If congenital, no injurious effect would be produced on the brain. If the result of injury in early youth, the brain might, without injury, adapt itself to the compression. Epilepsy is one of the consequences which may happen from an unnatural depression of the skull on the brain. In case of fracture of the skull, if there be

peices of the bone pressing in or on the brain that are not removed by trephining, epilepsy may ensue, and the epileptic convulsions become of frequent occurrence, and increase in intensity. In the first stages, epilepsy assumes the form of convulsions. In epileptic convulsions the party is seized without premonition, falls to the ground, foams at the mouth, is contorted in all his body, is insensible to everything, and remains in that condition for an indefinite period of time, varying from five to twenty minutes. After the subsidence of the convulsions, the party remains for a long time dull and stupid, utterly unconscious of what has taken place. The frequent recurrence of epileptic convulsions sometimes induces insanity, and this insanity may eventually degenerate into imbecility or idiocy.

82 *Testimony of Drs. Jaminet, Mont., Pallen, Leffingwell, John McDowell, J. F. Prewett, Linton, Steele, & Hammer.*

Drs. Jaminet, Montrose, Pallen, Leffingwell, John McDowell, J. F. Prewett, Linton, A. J. Steele, and Dr. Hammer, who were summoned as medical experts on the part of the defence. It was agreed between counsel that they would all testify substantially the same as Dr. Baudny, and that it should be so considered by the jury.

Testimony of J. H. Conn.

J. H. CONN, Esq., foreman of the jurors in the second trial of the defendant, was called on the part of the defense and asked his opinion as to the sanity of the defendant at the time of the homicide.

He was objected to by the circuit attorney, and the objection sustained by the court.

Counsel for the defendant stated that he expected to prove by the witness his opinion based upon the facts in the case, and the witness' knowledge of the defendant, that the witness would testify that he was of the opinion that the defendant was insane at the time of the homicide.

Counsel for the defendant excepted to the ruling of the court.

83 *Testimony of Groshon.*

GROSHON, Esq., one of the grand jurors who indicted the defendant, was next sworn on the part of the defense, and the following questions propounded:

Q. What is your occupation?

A. I am a hatter here in St. Louis.

Q. Do you know the defendant?

A. I do.

Q. How long have you known him?

A. Since the time of his indictment. After the grand jury had finished their labors, we all, as is the custom, visited the jail. We called the defendant out of his cell, to see him. We asked him some questions, and felt of his head. I went back afterwards to see him, as I felt some interest in his case. I examined him again.

Q. From what you know of him and the facts in the case, what is your opinion as to his sanity at the time of the homicide?

(Objected to by the circuit attorney, and the objection sustained by the court. Counsel for the defendant excepted, stating that he called the witness, not as an expert, but as a layman, simply for his opinion;

and that he expected to prove by the witness that he, witness,
84 was of the opinion that the boy (the defendant) was not of a sane mind at the time of the homicide.)

The counsel for the defendant then read the evidence of William Faulkner, as given at the first trial of the said cause, and agreed to in the bills of exceptions in the appeal of said cause, it being agreed to by the circuit attorney that it should go to the jury the same as if the witness were present and testified orally. It was as follows:

Testimony of W'm Faulkner.

My name is William Faulkner. I occupied the cell in the jail with the defendant one night in February last. During the night he rose up suddenly in the bed and struck me in the face. I caught hold of him, and he laid down again and said, "Ah! oh!" and complained of some headache. I only occupied the cell with him that night, and that is all I know.

Cross-examination:

That is all I know. It was in the night, and I only occupied it for one night.

The evidence of FRANK MILLER, taken the same as Faulkner, was, by consent, read to the jury, and was as follows:

Testimony of Frank Miller.

My name is Frank Miller. I occupied the cell in jail with Max. Klingler one night in the month of January last; I slept with Max.
85 During the night he rose up and seized me violently by the arm, and appeared very strangely and wild. I quieted him and got him to lie down again. A little while after, he cried out, "Oh, my head, my head." He complained of dreadful headache and pain in the chest. I got him quiet, and that is all I know. I only occupied the cell that night.

Cross-examination:

That is all I know that he did.

The counsel for the defendant then offered in evidence the printed copy of the letter, written by the defendant to his aunt just after he was put in jail, stating that the original was burned by the aunt just after she got it, and that the original could not be produced.

(It was objected to, and the objection sustained by the court; to which ruling of the court the defendant excepted.)

The defense here rested the case as to its evidence.

REBUTTAL.

Testimony of Mrs. Weider.

The State, in rebuttal, recalled Mrs. Weider, who testified that she never heard of any insanity being in the family of the def't—her own family on his mother's side, and that she had never seen or heard of defendant have a fit before the killing of Mr. Weider.

Cross-examination:

86 I left the old country 17 years ago. The defendant was a little child when I left. He may have had fits and I not know it, but he never told me anything about .

Testimony of Jacob Klingler.

JACOB KLINGLER was next called and sworn, and testified as follows:

My name is Jacob Klingler. I am brother of defendant's father. I never heard of insanity in the family. I left the old country and came to this country 17 years ago. I have not been back since.

Cross-examination:

The defendant was a child when I left. I did not know his mother's family much. I only knew his mother.

Testimony of Rudolph Margo.

RUDOLPH MARGO was next called and sworn, and examined as to the insanity in the family of the defendant. He testified that he knew the people of the defendant in Germany, but never heard of any insanity in the family; that he left the old country about a year before the defendant; that the defendant was small at the time; that he associated with defendant in Ettenheim when he was apprentice to the tailor business, and never knew him to be sick or have fits.

Testimony of Dr. Speigelhalter.

87 Dr. SPEIGELHALTER was recalled on the part of the State, in rebuttal of Dr. Bandny. This question was put to him by the circuit attorney:

Q. Dr., are you familiar with the facts in this case, and what is your opinion as to the insanity of the defendant at the time of the homicide?

(Objected to by the counsel, on the part of the defense, on the ground that the question was incompetent. The objection was sustained.)

Q. Dr., have you seen the defendant in prison?

A. I have.

Q. Did you ever see him have a fit?

A. I never did.

Q. Did you see him often?

A. I saw him three times, I think.

Q. Did you ever see any indications of insanity or remarkable traits about the defendant?

A. Can't say that I have. I remember that about the time Banks was to be hung I noticed at the cell door of the defendant this placard, which was put up by the def't: "Persons who want to see Max. Klingler, can do so by paying ten cents;" that is all that I remember.

Cross-examination:

88 Q. Dr., why did you tell Mr. McDonald and myself that you had something that would clear Max. Klingler, (meaning this piece of skull,) showing it to the Doctor?

(Objected to, and objection sustained.)

Testimony of A. J. Shore.

Mr. ANDREW J. SHORE was then called and sworn on the part of the State, and testified as follows:

I am deputy jailor. I know the defendant; have known him since he was put in prison. I never saw him have a fit, and never heard of his having one there; have seen him probably every day; have not noticed anything in particular about his cell, only the notice on the door, of which Dr. Speigelhalter spoke; he has been in jail nearly two years.

Cross-examination:

Max. is let out of his cell for about 15 minutes every day, once in the forenoon and once in the afternoon. I only see him in the day time; never saw him in the night. I never noticed anything very remarkable or strange about him, only that he seemed indifferent and careless as to his condition; never seemed to care much about that; he may have had fits in the night time. I remember that he complained of headache once or twice.

Testimony of Dr. Lingenfelder.

Dr. P. J. LINGENFELDER, the physician of the jail, was next
89 called and sworn on the part of the State, and testified that he knew defendant; that he never knew of his having a fit in jail; that he was sick once or twice; that it was nothing more than the ordinary sickness which prisoners sometimes have, and that since the last trial defendant had been attacked with the varioloid; he had fever then; was at no time out of his head; never knew or heard of defendant's having a fit; never knew or heard of his having any symptoms of insanity; always seemed and talked rational to me; visited the jail daily; the defendant is a very robust and healthy person.

Cross-examination:

I am not an expert in questions of insanity.

This being all the evidence on the part of the State, the case was closed pro and con, and the counsel for the defendant proceed' to make his final argument upon the issues and merits of the case. After the counsel for the defendant had argued the said cause for about an hour, and was proce'ding to comment upon certain statutes of Missouri, he referred to the sections 43 and 45 as provided in chapter 56, pages 311 & 312 of the general statutes, and remarked:

90 "GENTLEMEN OF THE JURY: If, on the one hand, you entertain a reasonable doubt as to the sanity of the defendant at the moment of the homicide, and give him the benefit of that doubt, and return a verdict of not guilty by reason insanity, the law has happily provided a way by which he shall be disposed of; it will be the duty of his honor to issue an order restraining him in custody until he is sent to the insane asylum."

Remark of court.

The court here interrupted the counsel and stated that this was a question for the consideration of the court alone after verdict; that if the defendant were acquitted on the ground of insanity at the time of

the commission of the alleged homicide, the court would not make an order to send him to the insane asylum unless satisfied that, at the time of acquittal, he was insane; that the court would never make an order to send a sane man to an insane asylum. The counsel for the defendant then and there excepted to remarks of the court. Counsel then proceeded with his argument. In his closing remarks he referred to the decision to the supreme court in the case of the State of Missouri vs. Max. Klingler, and was proceeding to read the same to the
91 jury to show what opinions the supreme court entertained as to the question of defendant's insanity and the weight of the evidence, when the court interrupted counsel, and would not allow him to read the said opinion for that purpose; to which ruling of the court defendant then and there excepted in due form.

When the circuit attorney proceeded to argue the case on the part of the State, after his argument the following instructions were asked on the part of the defense, the same having been submitted to the court before the arguments were begun:

Instructions for the defendant refused.

1st. Murder is when a person of sound mind, memory, and discretion, unlawfully takes the life of a fellow-being, against the peace and dignity of the State.

2d. That the onus of proving everything essential to the establishing of the charge against the accused is in the prosecution.

3rd. That the sanity of the prisoner at the time of the homicide is one of the essential requisites of guilt.

4th. The law presumes every man innocent until the contrary is shown, and that the burden of proof rests upon the State to establish all the conditions of guilt, and unless the jury are reasonably
92 satisfied, not only that the prisoner committed the act, but as to his criminal capacity and intent, they should acquit.

5th. That if, from the evidence, the jury believe that the prisoner, at the time he committed the act, was either by physical disease or mental impairment not voluntarily induced by himself, or both, operating upon his mind and mental faculties, unable to control his will and actions with reason and judgment in reference to the act so committed, then, in judgment of law, he was insane, and could not be guilty of the offense charged in the indictment, and is entitled to a verdict of not guilty.

6th. It is not necessary for the jury to believe that the prisoner is now insane to warrant a verdict of not guilty; it is enough if they believe that, at the time of the particular act, (the homicide,) his mind or mental faculties were so impaired by the injuries or disease, and that being so under the influence of a diseased mind, he was not responsible for his acts, and should be acquitted.

7th. That if the jury believe from the evidence that the defendant has ever been subject to epilepsy, caused by injuries upon the head, or inherited from his mother, and that his mind has been affected
93 and impaired by the same, then, in the eye of the law, he is not of a sound mind, and should be acquitted.

8th. If the jury believe from the evidence that the defendant was, at the moment of the homicide, actuated by an irresistable inclination to kill, and was unable to control his will or subjugate his intellect, then they must acquit.

9th. If the jury believe that, at the time of the homicide, the defend-

ant was actuated by an insane delusion so as not to be morally responsible for his act, they should acquit.

10th. The law does not require that the insanity which absolves from crime should continue for any length of time; it is enough if he was insane at the moment of the act.

11th. That, in considering all the evidence in the case, if the jury entertain a reasonable doubt upon the question of sanity, and whether at the time of the homicide the accused was under the influence of a disordered mind and unconscious of the nature of the act he was committing, it is the duty of the jury to give that doubt in favor of the accused, and they should find not guilty.

12th. That the burden of proof in every criminal case is on the
94 State to prove all the material allegations in the indictment, and if, on the whole evidence, the jury have a reasonable doubt whether the defendant is guilty of the crime charged, they are bound to acquit.

13. That if, from the evidence, the jury believe that the defendant inherits a taint of insanity and epilepsy on the maternal side, and that he suffered severe injuries upon the head when a boy about eleven years old, and that from such taint and injuries his mind has been affected so as to impair his memory, reason, and judgment, subjecting him to sudden and irresistable impulses and paroxisms of insanity, during which impulse and paroxisms he cannot act with judgment, reason, and discretion, then he is not responsible for the act, and that the homicide was committed in such a state of mind, then he should be acquitted.

14th. That if the jury believe from the evidence that the defendant killed the deceased under a sudden impluse of insanity, or in a fit of passion caused, or arising from, a diseased state of the mind, then he cannot be convicted of murder in the first degree.

15th. The jury are instructed that the opinions of the medical
95 experts, who, from long experience and observation, have become familiar with the different phazes of insanity, and have made that branch of medicine a speciality, is competent evidence and entitled to great weight with the jury in considering the questions of insanity and in determining the guilt or innocense of the defendant.

16th. In a case like this, the good character of the defendant for peace and quietness is a fact as pertinent to the issue as any other fact in evidence, and if you believe that he has established such good character, you should take that fact, in connection with all other facts, in passing upon the question of guilt or innocence.

The jury are instructed that if they should find the defendant not guilty, because they believe that at the time of the commission of the deed he was insane, the jury will so declare in their verdict.

The jury are instructed that sanity—the consciousness of the crime he was committing—is one of the essential elements of guilt, and if, therefore, they have a reasonable doubt whether he was sane when he committed the homicide, they will give the prisoner the benefit
96 of that doubt, and acquit. Which instructions the court refused to give; to which ruling of the court the defendant then and there excepted.

The court, of its own motion, then proceeded to instruct the jury, as follows:

Instructions given by the court.

The defendant stands charged in the indictment as having feloniously,

wilfully, deliberately, premeditatedly, and of his own malice aforethought, killed one Henry Weider, by shooting him in the back of the head with a pistol. In other words, the defendant is charged with murder in the first degree.

To constitute murder in the first degree, the killing must have been done wilfully, that is to say, intentionally, and not by accident; deliberately, that is to say, in a cool state of the blood, not in that heated state of the blood, which the law denominates passion, and which can only be caused by lawful provocation, premeditatedly, that is, thought of beforehand, for any length of time, however short.

The killing must also have been done with malice; malice does not mean spite or malevolence, as used and understood in ordinary parlance, but in law, and as used in the indictment it means that the killing has been attended with such circumstances as show a wicked, depraved, and malignant spirit, and evince a heart regardless of social duty, and fatally bent on mischief. Malice is also implied from an act of deliberate cruelty, as where one kill another suddenly, without any or without a considerable provocation. The intention is the essense of the crime of murder, and its guilt consists in the taking of the life of a human being with circumstances which show a cool depravity of heart, or a mind fully conscious of its views and designs.

97

Whenever this is the case, whenever it appears from the whole evidence that the homicide was at the moment deliberately and intentionally executed, the killing is murder in the first degree.

If you believe and find from the evidence that, at St. Louis County, the defendant did feloniously, wil'fully, deliberately, premeditatedly, and of his malice aforethought, kill Henry Weider in the manner and by the means charged in the indictment, you will find him guilty of murder in the first degree.

To find the defendant guilty of murder in the first degree, the jury must believe from the evidence, beyond a reasonable doubt, that the killing was done wil'fully, deliberately, premeditatedly, and with malice aforethought; and if from the evidence they entertain reasonable doubt, they should acquit.

98

You will observe that the court instructs you upon the degree of homicide which the law denominates murder in the first degree, because, in its opinion, the testimony in the case applies to that degree of criminal homicide, and none other. The defense set up in this case, as announced to you by the counsel for the defendant, is that at the time of the commission of the homicide with which the defandant is charged, he was insane.

Insanity, when satisfactorily established by the evidence, is a sufficient defense against any accusation of crime; but the insanity must be established to have existed at the time of the commission of the alleged offense; otherwise it cannot avail. It makes no difference if the party is shown to have been insane before or after the commission of the act. If it be not shown that he was insane at the time of its commission, the defense of insanity is valueless. The law presumes that every person who has reached the age of discretion, is of sufficient capacity to be responsible for crime; but this presumption may be rebutted by the evidence in the case.

99

When insanity is set up as a defense, the burden of establishing such insanity, affirmatively, to the satisfaction of the jury, rests upon the defense; but insanity, like any other fact in the case, may be proved by circumstances. Positive proof is not required.

It is not necessary, however, that this defense be established beyond

a reasonable doubt. It is sufficient if the jury is reasonably satisfied by the weight or preponderance of the evidence, that the accused was insane at the time of the commission of the act with which he is charged.

If you believe and find from the evidence that the defendand did kill Henry Weider in the manner and by the means charged in the indictment, but also find from the evidence that, at the time of such killing, the defendant was incapable, from mental insanity of any character, of distinguishing between right and wrong, or that at the moment his mind was insensible of the nature of the act he was about to commit, then you should acquit him on the ground of insanity at the time of the killing.

100 The opinions of professional men on a question of this character, are competent evidence.

The rule of law upon which the opinions of adepts, experts, or professionals is admitted, applies to all classes, where the question is one of skill or science, but their testimony is subject to the same scrutiny and consideration by the jury as that of any other witness in the case. Upon the question of the guilt or innocence of the defendant, you should be governed alone by the evidence in the case, and by the law applicable to that evidence as laid down in the instructions of the court.

Good character for peace and quietness is a fact in the case as pertinent to the issue as any other fact in evidence, and if you believe from the evidence that the defendant has established such good character, you should take that fact into your consideration, together with all the other facts, in passing upon the question of his guilt or innocence.

In the giving of which the defendant then and there excepted.

The said cause was given to the jury on Saturday night at ½9 p. m., and at 10 o'clock, a. m. the following Monday morning, they returned the following verdict:

Verdict.

101 We, the jury, find the defendant guilty of murder in the first degree, but would recommend him to the clemency of the court and the governor, in consideration of his youth and ignorance at the time of the act.

LESLEY GARNETT, *Foreman.*

On the 23d day of October, A. D. 1869, the defendant filed in the court the following motions and affidavits:

Motion for a new trial.

And now comes the defendant, and, by his counsel, prays this honorable court to set aside the verdict rendered in the above-entitled cause, and to grant him a new trial, for reasons as follows, to wit:

1st. Because the list of jurors furnished the defendant 48 hours before the day set for trial, were not competent and qualified jurors by the laws of the State, as provided in sections 7 & 8 of chap. 213.

2d. Because the list furnished the defendant contained only 36 names, whereas it should have contained 40, and because it was not a list of qualified jurors.

3rd. Because the court, of its own accord, and against the objection of the accused, discharged one of the jurors regularly empannelled as a juror, because the said juror would not and could not take the

102 oath of loyalty, as prescribed in the 6th section of the constitution of the State of Missouri.

4th. Because a large number of the jurors empannelled by the marshal were not citizens of the State of Missouri, and could not read, write, speak, or understand the English language.

5th. Because the court erred in rejecting competent and material evidence offered on the part of the defense.

6th. Because the court ruled out questions asked the medical experts on the part of the defense which were material and pertinent to the issue in the case.

7th. Because the court excluded the opinions of the medical experts upon the question of the fact as to the sanity or insanity of the defendant at the moment of the homicide.

8th. Because the court erred in restraining the counsel for the defense from reading the opinion of the supreme court upon the question of insanity and the weight of evidence.

9th. Because the court erred in refusing the instructions asked on the part of the defense.

10th. Because the court erred in its instructions upon the material matters of law.

11th. Because the verdict of the jury is against the evidence,
103 and the weight of evidence.

12. Because the verdict of the jury is against the law and the evidence.

13. Because the verdict shows upon its face that there must have been a doubt in the minds of the jury as to the mental condition of the de fendant at the time of the act.

14. Because the counsel for the defendant was prevented by the court from commenting upon sections 43 & 45, of chap. 56, of the revised statutes of this State, in the closing argument for the prisoner, the court also remarking that he would not issue any order sending a sane man to the asylum, or words to that effect, which remark, on the part of the court, had a tendency to influence the jury.

15. Because the court, on the trial of the issue in this in the presence of the jury, did comment upon the evidence without the consent of the accused or his counsel, in this that when the defendants' counsel, in his argument before the jury, stated to them that in case the defendant should be acquitted on the sole ground of insanity, that fact could be found by them in their verdict, when it would become the duty of the court, in case the court were satisfied from the nature of the of-
104 fense, or otherwise, that it would be unsafe to permit the prisoner to go at large, and make an order remanding him to the custody of the officer of the court to be dealt with as insane persons. The court interrupted said counsel, and in the presence and hearing of said jury, declared the court would not send a sane man to the asylum.

16th. Because the jury, on Sunday, while at the court-house, were interfered with in their deliberations, in this, by some outside party remarking in the hearing of the jury, that it was the opinion of the people outside that the defendant ought to be hung.

Motion in arrest of judgment.

Motion in arrest of judgment.

And now comes the defendant, and, by his counsel, moves this honorable court that the verdict rendered in the above-entitled cause be set

aside, and judgment in said cause arrested for the following reasons, to wit:

1st. The indictment in said cause and whereon said verdict and judgment rests is insufficient in law.

2d. The verdict is against the law.

3d. The verdict is against evidence and the law, and shows upon its face a doubt as to the sanity of the defendant at the time of the act which should have mitigated in his favor, and entitled him to a
105 verdict of acquittal.

Affidavit.

Affidavit of defendant.

And now comes the defendant, and being duly sworn, deposes and says:

That the verdict of the jury in the above-entitled cause is unjust and unfounded in law; that defendant was not enabled to present his defense in a full and satisfactory manner, owing to the fact that he was forced to submit his case in the hasty and limited manner; that he was not furnished with a list of qualified jurors 48 hours before the day of trial; that the panel of veniremen summoned by the marshal to try said cause was not a legal panel; that some of the veniremen were not citizens of the State, and could not speak, read, or write, nor understand the English language; that two of the jurors summoned to try the said cause had served as jurors in the first and second trial of said cause; that the court, of its own accord, excused and discharged one of the jurors regularly subpœned to serve in said cause as a juror, and whose name was furnished defendant on the list, because, and for the only reason that the said juror would not and could not conscientiously take the "oath of loyalty," commonly known as the "test oath," and prescribed in the sixth section of the second article of the constitu-
106 tion of Missouri; that the said juror was so discharged without the consent and against the objections of the defendant; that evidence on the part of the defense was rejected by the court; that com petent and material evidence (and of vital importance to the defendant) was ruled out by the court after it had been allowed to go to the jury in the nature of a question and answer to and from the medical expert who was called and sworn as a witness on the part of the defense; that the court interrupted and restrained the counsel for the defendant when commenting in his closing argument upon the law in relation to the disposition of the insane, as provided in sections 43 & 45, of chap. 56, of the revised statutes of Missouri of 1865, and remarked in the presence and hearing of the jury that the court would not enter an order sending a sane man to the asylum; that the court refused to instruct the jury upon material questions of law asked in the instructions on the part of the defense; that the counsel for the defense was restrained by the court from reading the decision of the supreme court in the case of the State vs. Max. Klingler; that, after the said cause had been submitted
107 to the jury, and left to the jury for their consideration, the jury was interfered with in their particular province in this that one certain paper, the Post, undertook in its Sunday morning issue, to publish how the jury stood, and commented thereon; that, on Sunday, while *while* the jury was at the court-house, and had stepped out in the yard for a few moments, some party, to deponent unknown, (yet known to some of the jurors,) came up and mingled with the jury, and remarked

in the hearing & presence of the jury, "that it was the outside opinion that the boy ought to be hung," which remark was made with intent to influence the jury, and had a tendency of so doing; that since the trial and verdict in the said cause defendant has learned of a school-mate of his who knew him in the old country, and is knowing of the injuries defendant received, and his sickness and mental condition afterwards; that defendant did not know or learn of the whereabouts of said witness until yesterday, the 21st day of October, when the information was conveyed to defendant; that he had used all and every means within his power to obtain all the material evidence for his defense; that he did not know said witness was in the country.

That defendant has a just and meritorious defense, founded in
108 truth and equity, and that he believes that if the law is given covering all the facts in the case he would receive a verdict in his favor; that his motion for a new trial has not been made out of levity or for the purpose of delaying the ends of justice, but that full justice may be had and done as between the State and himself.

(Signed) MAXIMILIAN KLINGLER.

Sworn to and subscribed to before me this 23rd day of October, A. D. 1869.

PETER P. DAILEY, *Clerk.*

The same being overruled by the court, counsel for the defendant excepted in due form, and asked for 20 days to file bill of exceptions, which was granted.

The same having been agreed upon by the circuit attorney, and attorney for the defendant, it is herewith submitted, and prayed to be signed and approved by his honor, the judge, and by him to be allowed to be filed as a part of the record of the cause, and all of which is so ordered, as witness his hand and seal.

WILSON PRIMM. [SEAL.]

108½ In supreme court, March term, 1870.

STATE OF MISSOURI,
County of St. Louis, ss:
Criminal Court of St. Louis County.

STATE OF MISSOURI
vs.
MAX. KLINGLER.

And now comes the said defendant and says that in the record and proceedings of the court below, in the above-entitled cause, there is manifest error, and for error said defendant assign the following, to wit:

1. That said court admitted improper and illegal testimony offered by plaintiff.
2. That said court rejected proper and legal testimony offered by defendant.
3. That the court gave to the jury improper and illegal instructions.
4. That the court refused to give to the jury proper and legal instructions offered by defendant.
5. That the verdict was against the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence, and against the law under the evidence.

8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the plaintiff, when it should have been rendered for the defendant.

That said court overruled the motion for a new trial, made by defendant.

10. That the court erred in excluding and discharging from the jury, against the objections & consent of the defendant, Andrew Park, for no other reason than that the said Andrew Park declined to take the oath prescribed in the sixth section of the second article of the constitution of the State of Missouri.

W. H. H. RUSSELL,
Att'y for Def't.

And now comes the plaintiff, and, for joinder in error, say there is no error in the record and proceedings of said criminal court of St. Louis County, in said cause, as assigned by said defendant.

C. P. JOHNSON,
Circ't Att'y.

(Indorsed:) State of Missouri, D. E., vs. Max. Klingler, P. E. Assignment of errors. Filed March 21, 1870. O. T. Fishback, cl'k, per J. F. Baier, D. C.

109 And afterwards, to wit, upon the 21st day of March, A. D. 1870, the following further proceedings were had in this cause, in the supreme court of the State of Missouri, to wit:

March term, 1870.

STATE OF MISSOURI, D. E., }
vs. }
MAX. KLINGLER, P. E. }

Now come the parties aforesaid, by their respective attorneys, and after argument herein, submit this cause to the court. Brief of plaintiff in error, and assignment of errors, filed.

And afterwards, to wit, at the same term of said court, the following further proceedings were had in said cause, to wit:

MONDAY, *April 4th*, 1870.

THE STATE OF MISSOURI, DEFENDANT IN ERROR, } Error to the St.
vs. } Louis criminal
MAX. KLINGER, PLAINTIFF IN ERROR. } court.

Judgment of St. Louis criminal court affirmed.

Now again come the parties aforesaid, by their respective attorneys, and the court being now sufficiently advised of and concerning
110 the premises, doth consider and adjudge that the judgment rendered herein by the said St. Louis criminal court be in all things affirmed and stand in full force and effect; and that the said defendant in error recover of the said plaintiff in error her costs and charges herein expended, and have execution therefor.

Opinion filed.

And afterwards, to wit, in the vacation of the said court, the following further proceedings were had in said cause, to wit:

Writ of error to Supreme Court of U. S.—Citation and bond filed.

FRIDAY, *May 27th*, 1870.

THE STATE OF MISSOURI, D. E.,
vs.
MAX. KLINGER, P. E.

Now comes the plaintiff in error herein, by his attorney, and files a writ of error from the Supreme Court of the United States in this cause, which is allowed. Citation filed; bond filed and approved.

Bond.

Bond.

Know all men by these presents that we, C. Daenzer, R. S. Mac-
111 Donald, and J. H. Sturgeon, are held and firmly bound unto the State of Missouri in the full and just sum of one hundred dollars, to be paid to the said State of Missouri; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals, and dated this twenty-seventh day of May, in the year of our Lord one thousand eight hundred and seventy.

Whereas, lately at the March term, 1870, of the supreme court of the State of Missouri, in a suit depending in said court between The State of Missouri, plaintiff, and Max. Klingler, defendant, judgment was rendered against the said Max. Klingler, defendant, and the said Max. Klingler, defendant, having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Missouri, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now the condition of the above obligation is such that if the said
112 Max. Klingler, defendant, shall prosecute said writ to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

C. DAENZER. [SEAL.]
R. S. McDONALD. [SEAL.]
J. H. STURGEON. [SEAL.]

Sealed and delivered in the presence of—

Approved.

W. CURRIER,
Associate Judge Sup. C't.

(Endorsed:) State of Missouri vs. Max. Klingler. Bond. Filed May 27th, 1870. O. T. Fishback, clerk, per J. F. Baier, D. C.

113 The United States of America to the State of Missouri, Hon. James W. McClurg, governor, Horace B. Johnson, esq., att'y general, greeting:

You are hereby cited and admonished to be and appear at a Supreme

Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein Max. Klingler is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David Wagner, presiding judge of the supreme court of Missouri, this twenty-ninth day of May, in the year of our Lord one thousand eight hundred and seventy.

DAVID WAGNER,
Presiding Judge Sup. C't Mo.

114 (Indorsed:) Filed May 27, 1870. O. T. Fishback, clerk, per J. F. Baier, D. C. Citation.

Service of the within is hereby accepted and acknowledged.

H. B. JOHNSON,
Att'y Gen'l of Mo.
J. W. McCLURG.

115 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the supreme court of the State of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at the March term, 1870, thereof, between The State of Missouri, plaintiff, and Max. Klingler, defendant, a manifest error hath happened to the great damage of the said Max. Klingler, defendant, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this twenty-seventh day of May, in the year of our Lord one thousand eight hundred and seventy.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the districts of Missouri, dated as aforesaid.

BEN. H. HICKMAN,
Clerk C. C. U. S. Missouri Districts.

Allowed by—

DAVID WAGNER,
Presiding Judge Sup. C't Mo.

116 STATE OF MISSOURI, *ss:*

I, O. T. Fishback, clerk of the supreme court held at St. Louis, of the State of Missouri, in obedience to the mandate of the within writ, herewith transmit to the honorable Supreme Court of the United States a full, true, and complete transcript of the record and proceedings and all things concerning the same, in the within-entitled cause, as fully as the same remains of record and file in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at office in the city of St. Louis, this eighth day of October, A. D. 1870.

[SEAL.] O. T. FISHBACK, *Clerk*,
Per J. F. BAIER, *D. C.*

(Indorsed:) Filed May 27, 1870. O. T. Fishback, clerk, per J. F. Baier, D. C.

(Indorsement on cover:) No. 305. Max. Klingler, plaintiff in error, vs. The State of Missouri. Missouri sup. court. Filed 23 November, 1870. The State of Missouri, D. E., vs. Max. Klinger, P. E. Error to supreme court of Missouri. Cha's P. Johnson for D. E., W. H. H. Russell for P. E. This transcript $40 00 due.

W. H. H. Russell

Supreme Court of the United States,

DECEMBER TERM, 1871.

MAX KLINGLER

vs.

The State of Missouri.

Writ of Error from the Supreme Court of Missouri.

W. H. H. RUSSELL,

COUNSEL FOR APPELLANT.

Supreme Court of the United States,

DECEMBER TERM, 1871.

MAX KLINGLER

vs.

The State of Missouri.

Writ of Error from the Supreme Court of Missouri.

W. H. H. RUSSELL,

Chas Taylor

COUNSEL FOR APPELLANT

REVIEW PRESS, 302 NORTH MAIN STREET, ST. LOUIS.

Supreme Court of the United States.

DECEMBER TERM, A. D., 1870.

WASHINGTON, D. C.

MAX KLINGLER, PLAINTIFF IN ERROR,
vs.
THE STATE OF MISSOURI, DEF'T IN ERROR. } *Writ of Error.*

STATEMENT OF THE CASE.

W. H. H. RUSSELL, *of Counsel for Plaintiff in Error.*

In the month of November, A. D., 1864, an election was held and delegates were chosen to assemble in convention, at the city of St. Louis for the purpose of amending the Constitution of the State of Missouri. In the month of January, A. D., 1865, the said delegates assembled and appointed a committee to revise and amend the said Constitution. On the eighth day of April, A. D., 1865, the said delegates reässembled in convention and adopted the report of the committee revising and amending the said Constitution. Revised Code of Missouri, 1865, pp. 21 to 46. On the sixth day of June, A. D., 1865, the said Constitution, as amended and adopted by the convention, was submitted to a vote of the people, only those being allowed to vote who could take the test oath prescribed in the sixth section of the second article of the said Constitution, p. 26

Revised Code of 1865. On the first day of July, A. D., 1865, Governor Fletcher, of Missouri, issued his proclamation declaring the said Constitution adopted, and in force after the fourth day of July, A. D., 1865.

The following sections, of which we complain, are among its provisions (Revised Code of 1865, p. 24, sec. 3, art. 2):

"At any election held by the people under this Constitution, or in pursuance of any law of this State, or under any ordinance or by law of any municipal corporation, no person shall be deemed a qualified voter who has ever been in armed hostility to the United States or the lawful authorities thereof, or to the government of this State, or has ever given aid and comfort, countenance or support to persons engaged in any such hostility, or has ever in any manner adhered to the enemies, foreign or domestic, of the United States, either by contributing to them, or by unlawfully sending within their lines money, goods, letters or information; or has ever disloyally held communication with such enemies; or has ever by act or word manifested his adherence to the cause of such enemies, or his desire for their triumph over the arms of the United States, or his sympathy with those engaged in exciting or carrying on rebellion against the United States; or has ever, except under overpowering compulsion, submitted to the authority or been in the service of the so-called "Confederate States of America;" or has ever left this State and gone within the lines of the armies of the so-called "Confederate States of America," with the purpose of adhering to said States or armies; or has ever been a member of or connected with any order, or society, or organization inimical to the government of the United States, or the government of this State; or has ever been engaged in guerilla warfare against loyal inhabitants of the United States, or in that description of marauding commonly known as bushwhacking; or has ever knowingly and willingly harbored, aided or countenanced any person so engaged; or has ever come into or has left this State for the purpose of avoiding enrollment for, or draft into, the military service of the United States; or has ever, with a view to avoid enrollment in the militia of this State, or to escape the performance of duty therein, or for any other purpose enrolled himself or authorized himself to be enrolled by or before any officer, as disloyal, or as a Southern sympathizer, or in any other terms indicating his disaffection to the government of the United States, in its contest with rebellion; or his sympathy with those engaged in such rebellion; or having voted at any election by the people in this State, or in any other of the United States, or in any of their terri-

tories, or under the United States, shall have thereafter sought or received, under claim of alienage, the protection of any foreign government, through any consul or other officer thereof, or in order to secure exemption from military duty in the militia of this State, or in the army of the United States; nor shall any such person be capable of holding in this State any office of honor, trust or profit under its authority, or of being an officer, counucilman, director, trustee or other manager of any corporation, public or private, now existing or hereafter established by its authority; or of acting as a professor or teacher in any educational institution, or in any common or other school, or of holding any real estate or other property in trust for the use of any church, religious society or congregation. But the foregoing provisions in relation to acts done against the United States shall not apply to any person not a citizen thereof, who shall have committed such acts while in the service of some foreign country at war with the United States, and who has since such acts been naturalized under the laws of the United States; and the oath of loyalty hereinafter prescribed, when taken by any one, shall be considered as taken in such sense."

Section 6 of article 2, Revised Code of 1865, pp. 26 and 45, is as follows:

"The oath to be taken as aforesaid shall be known as the oath of loyalty, and shall be in the following terms:

"*I, A. B., do solemnly swear that I am well acquainted with the terms of the third section of the second article of the Constitution of the State of Missouri, adopted in the year eighteen hundred and sixty-five, and have carefully considered the same; that I have never directly or indirectly done any of the acts in said section specified; that I have always been truly on the side of the United States, against all enemies thereof, foreign or domestic; that I will bear true faith and allegiance to the United States, and will support the Constitution and laws thereof as the supreme law of the land, any law or ordinance of any State to the contrary notwithstanding; that I will, to the best of my ability, protect and defend the Union of the United States, and not allow the same to be broken up and destroyed, or the government thereof to be destroyed or overthrown under any circumstances, if in my power to prevent it; that I will support the Constitution of the State of Missouri, and that I make this oath without any mental reservation or evasion, and hold it to be binding on me.*"

Section 11 of the same article provides that "Every court in which any person shall be summoned to serve as a grand or petit juror shall require

him, before he is sworn as a juror, to take the said oath in open court, and no person refusing to take the same shall serve as a juror."

The last clause of section 14, page 27, provides that * * "Whoever shall take said oath falsely, by swearing or by affirmation, shall on conviction thereof be adjudged guilty of perjury, and punished by imprisonment in the penitentiary not less than two years."

Section 1 of article 13, p. 44, provides for the enforcement of said Constitution as follows:

"The preceding parts of this instrument shall not take effect unless this Constitution shall be adopted by the people at the election to be held as hereinafter directed, but the provisions of this article shall be in force from the day of the adoption of this Constitution by the representatives of the people in this convention assembled."

Section 6 of the same article further provides that, "At said election no person shall be allowed to vote who would not be a qualified voter according to the terms of this Constitution, if the second article thereof were then in force * * * ."

The last clause of the same section declares that "Any person who shall falsely take, or, having taken, shall thereafter willfully violate the oath prescribed in this section, shall, upon conviction thereof by any court of competent jurisdiction, be adjudged guilty of the crime of perjury, and shall be punished therefor in accordance with existing law."

On the 25th day of December, A. D., 1868, the President of the United States issued the following proclamation:

"WHEREAS, The President of the United States has heretofore set forth several proclamations offering amnesty and pardon to persons who had been or were concerned in the late rebellion against the lawful authority of the government of the United States, which proclamations were severally issued on the 8th day of December, 1863, on the 26th day of March, 1864, on the 29th day of May, 1865, on the 7th day of September, 1867, and on the 4th day of July in the present year. And,

"WHEREAS, The authority of the Federal government having been established in all the States and Territories within the jurisdiction of the United States, it is believed that such prudential reservations as at the dates of said several proclamations were deemed necessary and proper, may now be wisely and justly relinquished, and that a universal amnesty and pardon for participation in said rebellion, extended to all who have

borne any part therein, will tend to secure permanent peace, order and prosperity throughout the land, and to renew and fully restore confidence and fraternal feeling among the whole people, and their respect for and attachment to the national government, designed by its patriotic founders for the general good;

"*Now, therefore be it known*, That I, Andrew Johnson, President of the United States, by virtue of the power and authority in me vested by the Constitution, and in the name of the sovereign people of the United States, do hereby proclaim and declare, unconditionally, and without reservation, to all and to every person who directly or indirectly participated in the late insurrection or rebellion, a full pardon and amnesty for the offense of treason against the United States, or of adhering to their enemies during the late civil war, with *restoration* of all *rights, privileges* and *immunities* under the Constitution and laws which have been made in pursuance thereof.

"In testimony whereof I have signed these presents with my hand, and have caused the seal of the United States to be hereunto affixed.

"Done at the City of Washington, the 25th day of December, in the year of our Lord one thousand eight hundred and sixty-eight, and of the independence of the United States of America the ninety-third.

"By the President. ANDREW JOHNSON.

"W. H. SEWARD, Secretary of State."

At the September term of the Criminal Court of St. Louis county, held in the city of St. Louis, State of Missouri, in the month of September, A. D., 1869, the plaintiff in error, Max Klingler, was put upon his trial under an indictment for the murder of one Henry Weider. Upon the day of trial, the court being duly opened, the said cause was called, and the State announced itself as ready for trial, as also did the accused. The jurors summoned to try the said cause were then called forward by the clerk of the court, and required to take the oath prescribed in the sixth section of the second article of the Constitution of Missouri. One of the said jurors, Andrew Park, Esq., declined to take the said oath, whereupon he was sworn by the said clerk to answer such questions as the court might see fit to propound. Upon being asked by the court why he declined to take the said oath, he replied, "*That during the late rebellion he was a sympathizer with the Confederate cause, and earnestly desired its success; that such were his sentiments then; that he thinks so stronger*

now than he did then; that he was born in the South, and that his heart was with the Southern cause; and that for these reasons he could not conscientiously take the proffered oath." Whereupon he was discharged from the panel, without further inquiry, and against the objections and consent of the accused.

The counsel for the prisoner claimed that the said oath was unconstitutional, and had been so declared by the highest court in the land, in the Cummings' case, in 1866, (4 Wal. R., 277,) and for that reason could not be required of the jurors. And further, that Mr. Park had been relieved of any or all of the offences enumerated in the third section of the second article of the Constitution of Missouri, by the proclamation of amnesty and pardon issued by the President of the United States, on the 25th day of December, A. D., 1869, and that he had been restored to all his previous rights and privileges as a citizen of the United States; that the discharge of Mr. Park from the regular panel of jurors summoned to try said cause, because he declined to take the said oath, was not a sufficient cause in law, and that the coercing of the said jurors to take said oath, was an infringement upon the rights of the juror and the accused, as guaranteed in the Constitution of the United States. The objections of the accused being overruled by the court (to which ruling of the court defendant then and there excepted), the trial was proceeded with, and the accused found guilty of murder in the first degree. An appeal was taken to the Supreme Court of Missouri, and the judgment of the court below affirmed. And the case is now brought before the court on writ of error, under the twenty-fifth section of the judiciary act.

ARGUMENT.

This court has jurisdiction of this case, under the second clause of the twenty-fifth section of the judiciary act of 1789, for the reason that the judge of the St. Louis Criminal Court exercised authority under the Constitution of the State of Missouri, to exclude a juror duly drawn and summoned on the panel of jurors to try the prisoner in the said court, from serving on the jury in this case, because the said juror declined to swear to the test oath prescribed in the sixth section of the second article of the Constitution of Missouri (record page); which said sixth section of the second article is repugnant to the Constitution of the United States, and the decision of the Supreme Court of Missouri, in

this case, is in favor of the validity of said authority exercised by the said judge of the Criminal Court, under the Constitution of the said State of Missouri. In the Cummings' case (4 Wal., 277), this court held jurisdiction on writ of error from the Supreme Court of Missouri, for the same reason and upon this very oath. The test oath being unconstitutional, the authority exercised by the said judge in excluding the said juror from the panel, and compelling the balance of the panel to swear to the said oath, made the judgment a nullity, and the decision of the Supreme Court of the State in favor of the validity of the exercise of that authority is repugnant to the Constitution of the United States, and gives this court jurisdiction. The test oath in Missouri having been decided to be unconstitutional in the Cummings' case, over two years before the exercise of said authority by the said judge of the St. Louis Criminal Court, the panel of jurors sworn to try the prisoner were illegally coerced, in violation of their consciences, to swear falsely by construction of law to an illegal oath. And the prisoner, who is presumed innocent until he is proved guilty, was not tried by a jury of his peers, and the trial was thereby avoided.

The question presented in this case for consideration embraces principles of the utmost importance to every enlightened government and community. It is the constitutionality of the *test oath*, as prescribed in the third, sixth and eleventh sections of the second article of the Constitution of the State of Missouri, as applicable to jurors, and as affecting the rights of a third party upon trial for life and liberty.

The constitutionality of the said oath, as affecting the rights of preachers, teachers and lawyers, having been determined in the case of Cummings *vs.* the State of Missouri, by the decision of this court, A. D., 1866, (4 Wal. R., 277,) and the Murphy and Glover test oath cases before the Supreme Court of Missouri, 1867, (41 Mo., 339), we shall contend that the same principles established in those cases apply to this case; that the said oath being unconstitutional as to preachers, teachers and lawyers, it is alike unconstitutional as to jurors when affecting the rights of a third party upon trial for his life.

The Constitution of the United States guarantees to every person certain inalienable rights, chief among which is the right of *trial by jury*. And, as if to secure this right unimpaired, and beyond all infringement or violation, it is expressly provided in the amendment articles, V. and

VI., that "No person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb, nor be compelled in any case to be a witness against himself; nor be deprived of life or liberty without due process of law; nor shall private property be taken for public use without just compensation."

"ART. VI. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

This right is not only secured in the National Constitution, but in every State Constitution there are substantially the same provisions.

In the Declaration of Rights in the Constitution of Missouri, sections XVII. and XVIII., of article I, we find these provisions:

"*That the right of trial by jury shall remain inviolate.*"

"That in all criminal prosecutions the accused has the right to be heard by himself and his counsel; to demand the nature and cause of accusation; to have compulsory process for witnesses in his favor; to meet the witnesses against him face to face; and in prosecutions, on presentment or indictment, to a speedy trial by an impartial jury of the vicinage; that the accused cannot be compelled to give evidence against himself; nor be deprived of life, liberty or property, but by the judgment of his peers or the law of the land."

Such are the safeguards to personal liberty, which are guaranteed to every human being within the jurisdiction of the United States.

A more powerful illustration of those benign prerogatives could not be had than in this particular instance. A poor boy, seventeen years of age, leaves his native land, and seeks a home with his uncle in America. He was but five months in the country of his adoption, when, in a moment of wild and terrible frenzy, he killed his generous uncle and benefactor. He was arrested, and arraigned for the highest crime known to the law. He could not understand a word of the English language; he was a stranger in a strange land, without friends, without money even to employ

counsel; no one to care for or grieve, in his terrible misfortune. And yet he was fully protected; the same law which restrained him of his liberty protected him from violence or wrong; the sacred mantle of justice rested as gracefully upon his humble form as it would upon that of the most exalted in the land.

Such was the design and foresight of those illustrious men who conceived the theory of our government, and gave to us and our posterity the grandest palladium of civil liberty ever yet devised by man, the *Constitution of the United States.* In the eloquent and forcible language of this Honorable Court, "*The Constitution of the United States is a law for rulers and people equally, in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances.*"

The right of trial by jury cannot be impaired or infringed upon by State legislation, and any law which has a tendency to disturb that right is unconstitutional, and in contravention of the theory and spirit of our government.

I.

The oath prescribed in the third, sixth and eleventh sections of the second article of the Constitution of Missouri is repugnant to the Constitution of the United States, and an infringement upon the right of trial by jury.

Upon a careful and impartial analysis of the said Constitution of Missouri, it is evident that the men who framed it were neither statesmen nor lawyers; that in the excitement and feeling consequent upon the event of their assembling, they were led astray by the blind impulse of faction, prejudice and passion.

The document, in the first place, is inconsistent with itself, and I might say with almost every principle of enlightened jurisprudence.

In the Declaration of Rights, article I., section V., it proclaims:

"That the people of this State have the inherent, sole and exclusive right of regulating the internal government and police thereof, and of altering and abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness; but every such right should be exercised in pursuance of law, and consistently with the Constitution of the United States."

And, as if to be more clear and comprehensive, it further declares, in section VII. of the same article:

"That every citizen of this State owes paramount allegiance to the Constitution and Government of the United States, and that no law or ordinance of this State in contravention or subversion thereof can have any binding force."

It further declares, in section XXVII., p. 37:

"That the free communication of thoughts and opinions is one of the invaluable rights of man, and that every person may freely speak, write and print on any subject * * * ."

Section XXVIII. provides:

"That no *ex-post facto* law, nor law impairing the obligations of contracts, or retrospective in its operation, can be passed."

Notwithstanding these declarations and provisions, the very next article of the said Constitution provides, that any person who ever gave aid, countenance or support to persons engaged in the war on the part of the South, or by act or word manifested his adherence to the cause of the South, or desire for its success, or sympathy with those engaged in said cause, or ever left the State of Missouri and went within the lines of the armies of the Confederate States, for the purpose of adhering to said States or their armies, or was ever a member of or connected with any order or society or organization inimical to the Government of the United States or State of Missouri, or ever willingly and knowingly harbored, aided or countenanced any person so engaged, or ever went into or left the State of Missouri for the purpose of avoiding enrollment for or draft into the military service of the United States; or ever, with a view to avoid enrollment into the militia of the State of Missouri, or to escape the performance of duty therein, or for any other purpose enrolled himself, or authorized himself to be enrolled, by or before any officer, as disloyal, or as a Southern sympathizer, or in any other terms indicating his disaffection to the Government of the United States in its contest with rebellion, or his sympathy with those engaged in such rebellion, or having ever voted at any election by the people of the State of Missouri or any State, or in any of the Territories, or held office in the State, or any State or Territory, or shall have sought exemption from military duty: That unless a person will swear his entire innocence to all of the said alleged grievances, he shall be deprived of all honors, benefits and privileges which he previously enjoyed as a citizen. That unless he will swear in open court

that he is well acquainted with the terms of the third section of the second article of the Constitution of Missouri, adopted in the year 1865; that he has carefully considered the same, and has never directly or indirectly done any of the acts in said section specified; that he will support the Constitution of the United States as the supreme law of the land, any law or ordinance to the contrary notwithstanding; that he will support the Constitution of the State of Missouri; and that he makes the said oath without any mental reservation or evasion, and holds it to be binding upon him, he shall not serve upon a jury with his neighbors and fellow-citizens.

A more direct and dangerous interference with the privileges of a citizen, and the right of trial by jury, has never been made in this country than was designed by the operation of the said Constitution. Not only were the framers of that Constitution desirous of prohibiting the citizen, who may have sympathized with the South, from all privileges and immunities, but they sought to invade the courts of justice, and by operation of law ascertain who would subscribe to the said oath.

Observe the exact language of the sixth section of said second article:

"Every court in which any person shall be summoned to serve as a grand or petit juror, shall require him, before he is sworn as a juror, to take said oath in open court, and no person refusing to take the same shall serve as a juror."

Could there be a provision more exclusive in its bearing? Suppose, if your Honors please, that every citizen in the city and county of St. Louis had been in the Confederate army; or, if not in actual service, had been in sympathy with the said cause; or, as an act of humanity, had befriended some one in the said army; or had left the State of Missouri and gone into the State of Illinois; or had left the State of Illinois, or any other State, and gone into the State of Missouri, for the purpose of avoiding the draft into the militia of the State of Missouri, or the armies of the United States. Where, then, would be the right of trial by jury in the State of Missouri, under the said Constitution?

Again, a citizen might be perfectly loyal, and yet refuse to take said oath because he believed it to be unconstitutional, and in violation of his conscience as an honorable man.

In other words, he is obliged to swear in the same oath that he will support the Constitution of the United States as the supreme law of the land, any law or ordinance to the contrary notwithstanding, and the Con-

stitution of Missouri, the very same clauses of which were declared to be unconstitutional by this court in 1866.

How, then, can we reconcile his position with the declaration in the said State Constitution, that every citizen owes paramount allegiance to the Constitution and Government of the United States, and that no law or ordinance of the State of Missouri in contravention thereof can have any binding force?

He could not take the said oath without committing moral perjury, and the court could not compel him to take it. Thus, by the operation of the said clauses in said Constitution, the better class of citizens in that community are excluded from jury service.

At the trial of the said cause, it was not contended, on the part of the State's attorney, that the said oath was a necessary qualification, nor did the State's attorney challenge the said jury at all.

Mr. Park had been regularly drawn and summoned as a juror, and his name had been furnished the accused, on the regular list, forty-eight hours before the day of trial. Upon that list the prisoner relied for the selection of his jury; and, supposing the panel to be his to select from, announced himself as ready for trial.

The jurors were then called forward, and required by the court to take the said oath. It was found that one of the jurors (Mr. Park) would not take the oath; whereupon he was discharged by the court without being challenged by the State or the defence, thereby vitiating the panel, and depriving the accused of one of his substantial rights secured by law.

Revised Code of Mo., 1865, p. 849, §§ 4, 6, 7 and 8.

Wagner's Statutes, vol. 2, p. 1102, §§ 4 to 9.

The qualifications of a juror, required and recognized by the statute laws of Missouri, are, that "Every juror shall be a white male citizen of the State, resident in the county, sober and intelligent, of good reputation, and over twenty-one years of age, or otherwise qualified."

Revised Code of 1865, p. 597, § 2.

The disqualifications are: "Every person who shall be convicted of a felony shall be forever disqualified from voting at any election, or holding any office of honor, profit or trust within this State, and moreover be rendered incompetent to be a juror in any case."

Revised Code, 1865, p. 798, § 36; p. 791, § 66; p. 804, § 47; p. 822, § 55.

Wagner's Statutes, vol. 1, p. 451, § 40.

R. S., 1855, p. 587, § 13; p. 568, § 46; p. 586, § 70; p. 608, § 47; p. 635, § 56; p. 275–9, §§ 6 and 11.

The right to serve upon a jury is a right recognized by the law of the land, and vests in every citizen of the United States, upon his becoming twenty-one years of age. He cannot be deprived of that right except by due process of law, which in the State of Missouri is upon the conviction of some felony.

Mr. Park, for the simple expression of his opinions and sympathies, was excluded from the court room as a juror, accused, condemned, and punished, for that which has never been declared to be even an offence.

That there was an intent on the part of the delegates who framed the said Constitution, to deprive every person who may have sympathized with relatives or friends in the South, or who may have performed any of the acts in said third section specified, of all privileges previously enjoyed, there can be no doubt. The circumstances which gave rise to its adoption, and the results which it accomplished, establish that fact beyond all question.

The great political excitement of the times called forth those men who were partisan in their feelings, and more or less embittered against those who differed from them in opinion and in sympathy. As an illustration of that fact, we need only remember that the said Constitution was not proclaimed until after the war had ended and peace had been declared. If Mr. Park had been in sympathy with the South, or had performed any of the acts enumerated in said section, it was before the adoption of said Constitution.

The said oath, for its proscriptive severity, has no precedent in the history of enlightened jurisprudence, in fact we may say none have ever been known of a more peculiar nature.

Not even in the days of judicial tyranny, when the Star Chamber fulminated its judgments against life and liberty, were such sweeping enactments promulgated as was intended by the operation of the Missouri Constitution.

When this oath was before the court, for consideration in the Cummings' case, six years ago, it was then held by your Honors that "The

oath presented by the Constitution of Missouri, divided into its separable parts, embraces more than thirty distinct affirmations or tests. Some of the acts against which it is directed constitute offences of the highest grade, to which, upon conviction, heavy penalties attached; some of the acts have never been classed as offences in the laws of any State; and some of the acts, under many circumstances, would not even be blameworthy * * * ."

It is not only proscriptive, but highly retrospective in its character; the future and the past are comprehended in its meaning; the expression of words or feelings natural to one's location or relations in life, whether arising from evil or humane motives, are impugned and brought in question. A person actuated by the noblest and purest promptings of nature is affected and proscribed by its operation.

When Mr. Park was excluded from the panel as a juror, it was only because of the fact that he could not subscribe to the said oath, which in point of law was no reason for his exclusion. He was in every respect well qualified; a citizen of high standing and position in the community, a man well calculated for the responsible and important duties of a juror, and as such was privileged to serve with his neighbors and fellow-citizens. If he had been in sympathy with the South, it was not an offence recognized by law, and was not punishable in any form or manner at the time the same was extended.

It was held by this court in the Cummings' case (4 Wal., p. 277), that *"Under the form of creating a qualification or attaching a condition, the States cannot in effect inflict a punishment for a past act which was not punishable at the time it was committed, and that deprivation or suspension of any civil right for past conduct is punishment for such conduct."* It was further decided that the clauses set forth in the said Constitution relating to said oath, were in the nature of a bill of attainder, and as such repugnant to the Constitution of the United States.

The same doctrine was maintained by this court in the *ex-parte* Garland case (4 Wal., p. 333), in which it was held that Congress, with all its great powers to make war, levy taxes and suppress rebellion, could not pass a law of that character.

It was held by the Supreme Court of Missouri, at the October term, A. D., 1867, in the Murphy and Glover test oath cases (41 vol. Mo., 339), that the said oath, as prescribed in the third, sixth, seventh, ninth,

and fourteenth sections of the second article, so far as relating to past acts, is a bill of pains and penalties, within the prohibition of the Constitution of the United States, and therefore unconstitutional and void; and that the decision of this court in the Cummings' case established the rule in all similar cases.

Judge Holmes, in his able opinion (41 Mo., 362), held that "The persons affected by the test oath were entitled to the benefit of the legal presumption of innocence, in conformity with the great principles of public law which constitute the law of nations, as recognized by the Constitution of the United States. "Those who were citizens, and became rebels and criminals in law, are by the amnesty proclaimed restored to their former estate and condition of citizenship, and must thenceforth be presumed innocent until convicted of some new crime; and are entitled to the common benefit of the laws and government, and to nothing more; they owe obedience to the laws, and are entitled to the protection of the law; for their opinions and feelings, when not put forth in any new acts of resistance, they are not responsible to the civil law."

"The right of trial by jury, and the presumption of innocence involved therein, is protected by the Federal Constitution, and cannot be infringed upon by a State."

"The exclusions and disabilities of the oath of loyalty refer directly to the enumerated acts, and it is assumed that those persons have done some one or more of the acts of which some are manifestly crimes. And all are dealt with in the same way, as if they were of a like nature; the truth of which they are obliged to confess by the impossibility of their taking the oath, thus effectually changing the rules of evidence and subverting the presumption of innocence, retrospectively in every individual case, contrary to the law of nations, and the national right of trial by jury in criminal cases."

"It must be assumed that the legislative body intended to do what is actually done, and that would seem to be essentially nothing else than a legislative sentence of punishment for past conduct as a criminal. And so it may be concluded that the act itself assumes judicial magistracy, weighs the offence and the proofs, and decides upon the necessity and fitness of the penal judgment, assumes the guilt, ascertains the persons and declares the punishment."

It is clearly evident that the said third, sixth and eleventh sections of article two of said Constitution presume that the juror is guilty of the acts specified, and adjudge the deprivation of the right to act as a juror unless he remove the presumption by taking the expurgatory oath. In fact, they assume the guilt, and adjudge the punishment conditionally.

A more dangerous precedent or system of legislation could not have been inaugurated than was sought by the operation of the said Constitution. That great and good man, the illustrious statesman and lawyer, Alexander Hamilton, in speaking of such legislation soon after the treaty of 1783, wherein the statutes of New York contained a similar oath, said:

"If we examine it with an unprejudicial eye, we must acknowledge, not only that it was an evasion of the treaty, but a subversion of one great principle of social security, to-wit: that every man shall be presumed innocent until he is found guilty. This was to invert the order of things; and, instead of obliging the State to prove the guilt in order to inflict the penalty, it was to oblige the citizen to establish his own innocence to avoid the penalty. It was to excite scruples in the honest and conscientious, and to hold out a bribe to perjury. It was a mode of inquiry who had committed any of the crimes to which the penalty of disqualification was annexed, with this aggravation, that it deprived the citizen of the benefit of that advantage which he would have enjoyed by leaving, as in all other cases, the burden of proof upon the prosecutor. Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of disfranchisement, disqualification and punishments by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens at pleasure by general description, it may soon confine all the voters to a small number of partisans, and establish an aristocracy or oligarchy. If it may banish at discretion all those whom particular circumstances render obnoxious without hearing or trial, no man can be safe, or know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government would be a mockery to common sense. The people are sure to be the losers in the event whenever they suffer a departure from the rules of general and equal justice, or from the true principles of universal liberty."

As the said oath could not be taken by Mr. Park, it operated as a legislative decree; and his exclusion from public service as a juror in the community in which he lives is a punishment, inasmuch as it makes him an exile from his own home by debarring him of all rights and privileges which he previously enjoyed as a citizen.

EFFECT OF THE PRESIDENT'S PROCLAMATION OF AMNESTY.

The proclamation of general amnesty and pardon, issued by the President on the 25th day of December, A. D., 1868, and the decision of this court in the Cummings' case, A. D., 1866, made the said oath nugatory and uncalled for in every respect. The pardon granted by the President was a full and complete pardon for all offences contemplated in the said oath, and by the effect and operation of said pardon Mr. Park, if guilty of any of the acts specified in said third section of the Constitution of Missouri, was fully pardoned for the same, and was to all intents and purposes free from any compliance with the said oath or its provisions. He was under no obligations whatever to take the said oath, and the court had no right to exact it of him; and, in fact, he need not have assigned any reasons why he could not comply with its provisions. It had been declared by the highest court in the land to be unconstitutional; and further, he was free from its operation because of his pardon.

That the President had the right and power to grant the pardon, and relieve all persons of any offences committed against the government during the war, cannot be denied. This court, in the *ex-parte* Garland case (4 Wal., 380), established the law in that respect beyond all question. It was held in that case that "The Constitution provides that the President shall 'have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.' The power thus conferred is unlimited, with the exception stated. It extends to every offence known to law, and may be exercised at any time after its commission, either before proceedings are taken, or during their pendency, or up to conviction or judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions. Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A

pardon reaches both the punishment prescribed for the offence, and the guilt of the offender. And when the pardon is full, it releases the punishment and blots out of existence the guilt; so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity."

This pardon was complete in all its bearings, and applied to Mr. Park the same as if it had been an individual pardon. It proclaimed and declared, unconditional, and without reservation, to all and to every person who directly or indirectly participated in the late insurrection or rebellion, a full pardon and amnesty for the offence of treason against the United States, or of the adhering to their enemies during the late civil war, with *restoration of all rights, privileges and immunities* under the Constitution and laws which have been made in pursuance thereof.

Mr. Blackstone (vol. 2, p. 318,) says, "The effect of pardon is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains pardon. It gives him a new credit and capacity, and the pardon of treason or felony, even after conviction or attainder, will enable a man to have an action of slander for calling him a traitor."

Mr. Bishop, in his able treatises, holds that "the effect of a full pardon is to absolve the party from all the consequences of his crime, and of his conviction thereof, direct and collateral; it frees him from the punishment, whether of imprisonment, penalty, or whatever else the law has provided."

Bishop's Criminal Law, § 713.

28 Pa. R., 297; 24 Pick, 280.

The pardon relieved the excluded juror (as well as those who were illegally coerced and sworn) of all disabilities or liabilities created or specified in the said third, sixth and eleventh sections of the Constitution of Missouri, and the exclusion of the said juror and the coercion of the panel to the taking of said test oath was in violation of the Constitution of the United States, and a direct subversion of the general principles and theory of the government.

We have, then, in the analysis of the said Constitution of Missouri, one of the most remarkable legislative efforts of the age. We find a State, in its sovereign capacity, adopting a constitution which, in its operation and effect, directly interferes with the administration of justice and the substantial rights of its citizens. From what source springs this power? Certainly not from the general government, for it was held in the Milligan case (4 Wal. R., 4) that neither the President, nor Congress, nor the Judiciary can disturb any one of the safeguards of civil liberty incorporated in the Constitution. A State legislature has no power to interfere with the administration of justice, either criminal or civil, in the courts. (7 Humphries' R., 152.) No such right was reserved to the States in the Federal compact; otherwise it might be said that a State, in the regulation of its own internal government, might provide that unless a person would swear to a certain political oath, he should be disqualified as a juror. And thus it might so limit its jury system as to effectually abolish it. They might, with as much propriety, provide that unless a person was born in a particular city, county, section, or state, he could not serve as a juror.

Says the learned Chief Justice Savage, in the case of Jacob Baker *vs.* The People of the State of New York (3 Cowen, R., 686):

"Whether the legislature can excuse from public trusts any person not excluded by the express rules of the Constitution, is the question which I have already examined; and according to my views of that question, there may be exclusion by law in punishment for crimes, but in no other manner and for no other cause." As the law now exists in Missouri under the said Constitution, it is not only the right, but the duty of every man who has not been convicted of some felony, to serve as a juror; and yet, when he is summoned and brought into court, he is debarred from that privilege, unless he will in open court swear to support two constitutions, one of which is in conflict with the other, and which this court has long since decided to be unconstitutional. Again, by the general laws of the State he is compelled to do a duty; and yet, by virtue of the said Constitution of the said State, he is compelled not to do that duty; the result of which is he can do neither, thereby impairing the jury system and disturbing the right of trial by jury.

Mr. Park nor any other person contemplated in the said third, sixth and eleventh sections of the Constitution of Missouri, can never take the said oath, and hence they are forever excluded from jury service.

Such was the design, object and motives, of the men who framed the said Constitution. They knew and fully understood what would be the effect and result of such provisions, as was said by this court in the Milligan case (4 Md. 114): "In interpreting a law, the motives which must have operated with the legislature in passing it, are proper to be considered."

The war between the States had but just ended when the said Constitution was adopted and proclaimed; the people were prejudiced and bitter from the rude passions of war, and those in power sought to prevent their enemies from ever after enjoying the privileges of citizenship. Could they have done it in a more effectual manner? Did not the exaction of the said oath in every profession and honorable calling, clearly indicate the intent and spirit of the said sections? What strange conceptions of justice must have pervaded the minds of those men, when they were not content with the political scope of the oath, but boldly entered the sanctuary of the judiciary branch of the government, and struck at the most sacred and vital prerogative of the American citizen, the *right of trial by jury*. That great and eminent jurist, Chief Justice Marshal, in one of his able opinions, said: "Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions, to which men are exposed.

The restrictions on the legislative power of the States are obviously founded in this sentiment, and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State." Fletcher vs. Peck, 6 Cranch, 137). Not only were these rights secured and guaranteed in the Constitution of the United States beyond all question or doubt, but we find that in order to more perfectly secure the universal protection to personal liberty the fourteenth amendment was passed, the first section of which in point of research and scope, is the most powerful provision ever yet incorporated into any bill of rights or constitution, and is an impregnable barrier for all time to come against the dogmas of political factions or usurpation. It is as broad, clear and powerful, as the English language can express:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws."

This amendment was promulgated by the Secretary of State on the 28th of July, 1868, and was ratified by the State of Missouri even before it was officially sent to the States; so that it was in full force and effect at the time of the trial of this cause in the court below.

The said section of the amendment seems to have been framed and incorporated in the Constitution of the United States for the very purpose of preventing such legislation, constitutions and provisions, as we find in the Constitution of Missouri. In fact the Constitution of Missouri was before this court, considered and pronounced against, in 1866, and was more or less known throughout the country for its remarkable, objectionable, and unconstitutional features.

The amendment having been ratified by the States in 1868, what authority or right had the Judge of the St. Louis Criminal Court to enforce the said oath? What guarantee or protection has a person against the usurpation of his rights, if courts in the exercise of their functions are not guided by the principles of justice, as contained in the fundamental laws of the land.

We find in the first article of the Constitution of Missouri a general declaration of the relations of that State to the general government, in these words: "That the general, great and essential principles of liberty and free government may be recognized and established, and that the relations of this State to the Union and government of the United States, and those of the people of this State to the rest of the American people, may be defined and affirmed we do declare."

Among other things: "That courts of justice ought to be open to every person, and certain remedy afforded for every injury to persons, property, or character; and that right and justice ought to be administered without sale, denial or delay. That the right of trial by jury shall remain inviolate; that no person can be deprived of life, liberty, or property, but by the judgment of his peers or the law of the land."

"That treason against the State can consist only in levying war against it, or in adhering to its enemies, giving them aid and comfort; that no person can be attainted of treason or felony by the General Assembly." * * * *

"That the free communication of thoughts and opinions, is one of the invaluable rights of man; and that every person may freely speak, write, and print, on any subject." * * *

"That *no expost facto law*, nor law impairing the obligation of contracts or *retrospective* in its operation can be passed." Is it not strange and startling that with such a bill of rights in the first article, we find in the very next article a direct interference and prevention of those rights.

How an intelligent body of men assembled for the purpose of revising and amending the Constitution of a State of this Republic, could have advanced such doctrines as are contemplated in said sections, is certainly a mystery and wonder.

The great Blackstone in speaking of this kind of legislation, says: "There is still a more unreasonable method than this, which is called making of laws *expost facto*, where after an action (indifferent in itself) is committed, the legislature then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law. He had therefore no cause to abstain from it, and all punishment for not abstaining must of consequence be cruel and unjust."

1 Bl., 46.

That the said oath and the sections complained of are *expost facto*, and in the nature of a bill of pains and penalties this court by its decision has already determined.

And it would seem that the decisions rendered in the Cummings' and Garland cases should have been recognised by the courts throughout the land, as a final disposition of that question. As was said by a distinguished member of this court, in the dissenting opinion, "It may be hoped that the exceptional circumstances which give present importance to these cases will soon pass away, and that those who made the laws, both state and national, will find in the conduct of the persons affected by the legislation just declared to be void, sufficient reason to repeal or essentially modify it. For the speedy return of that better spirit which

shall leave us no cause for such laws, all good men look with anxiety, and with a hope, I trust, not altogether unfounded." 4 Wal., 382.

Since the Constitution of the United States is the supreme law of the land, and is a full and sufficient guarantee against the passage of such laws, how can a State, through its courts, enforce such laws? If the jury system of our country can be abridged and impaired by the enforcement and exaction of certain political expurgatory oaths, which are unconstitutional and have nothing to do with the merits of the case, then what guarantee is there to the right of trial by an impartial jury? Instead of the judicial branch of the government being the great conservatory of personal rights and liberty, it becomes, like the Star Chamber of old, the engine of tyrannical power and usurpation.

In the conclusive language of this court, in passing upon this right in the Milligan case (4 Wal., 118–19), "No graver question was ever considered by this court, nor one which more clearly concerns the rights of the whole people; for it is the birthright of every American citizen, when charged with crime, to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose; and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law, human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers or the clamor of an excited people." Ibd., 122–3.

"The great minds of the country have differed on the correct interpretation to be given to various provisions of the Federal Constitution, and judicial decision has been often invoked to settle their true meaning; but until recently, no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is now assailed; but if ideas can be expressed in words, and language has any meaning, this right—one of the most valuable in a free country—is preserved to every one accused of crime, who is not attached to the army, or navy, or militia, in actual service."

That Mr. Park and the prisoner upon trial were entitled to this right, cannot be denied. In exacting the said oath of Mr. Park and the jurors, they were accused of crime; and before the court could administer the penalty consequent upon a non-compliance with the same, they were entitled to a trial by jury; and without a trial and conviction by due process

of law, they were, in the eye of the law, as innocent as purity itself. And the prisoner upon trial had the right to expect and demand their services as jurors, and could not be deprived of that right. And what is due process of law? It is understood and well settled, that, ordinarily, it includes a complainant, a defendant and a judge, regular allegations, opportunity to answer, and a trial according to some settled course of proceeding.

18 Howard's R., 276.

2 Coke, Inst., p 50.

53 Pa. R., 112 to 121.

It is not due process of law when the judgment is not final and leaves the accused exposed to another trial for the same offence in another tribunal.

It was undoubtedly the intention of the framers of the Missouri Constitution that whenever a citizen refused to take the said oath, he should be presumed to be guilty of the acts set forth in the said third section and was thereby accused of the same, and from thenceforth to be regarded as a traitor, and to be dealt with accordingly. They knew that every citizen in the State was subject to jury duty in the county where he resided, and that upon being brought into court under summons as a juror, they would by virtue of the said oath and its provisions, ascertain his relative position in the late unfortunate war.

It was truly said by the illustrious Athenian orator: "The design and object of law, is to ascertain what is just, honorable and expedient, and when that is discovered, it is proclaimed as a general ordinance equal and impartial to all."

The relation of the citizen and subject to the State and government under which he lives, is that of protection on the one hand and obedience on the other; and it is equally essential for the safety of both, that the laws should be wise, impartial, and just, without these necessary ingredients a Republican form of government cannot exist.

Thus it was that the great and good men who founded this Republic, secured the principles of civil liberty as they supposed beyond all danger of interruption or attack. The principles of the *Common Law, the Bill of Rights, the Petition of Right and Magna Charta* which had cost England seven centuries of bloody conflict, were all blended in the Declaration of Independence and the Constitution of the United States. With

what care and foresight they sought to secure and preserve the administration of justice, and they proclaimed in the organic laws of the land three grand safeguards of personal liberty.

First, *That no person can be tried or held accountable for an act which was innocent when committed.* To secure this right they declared in section nine of article one, that "*no bill of attainder or expost facto law shall be passed.*" Not only that Congress is directly prohibited from passing such laws, but as a double security and preservation against all legislation of that character they further declared in section ten of the same article, that "*no State shall pass any bill of attainder expost facto law, or law impairing the obligation of contract, or grant any title of nobility.*"

Second, No person can be made to testify or furnish evidence against himself, and he shall not be subject to arrest without a judicial warrant founded on at least some proof of probable cause. Amendment articles 5 and 6.

Third, No punishment can be inflicted without trial and conviction by due process of law. He shall be informed of the accusation against him, and shall be entitled to the benefit of counsel, to meet the witnesses against him face to face, and to the right of public trial by an impartial jury of his fellow-citizens. He shall be presumed to be innocent until pronounced guilty by the *unanimous* verdict of an impartial jury of his peers, and he shall not for the same offense be twice put in jeopardy of life or limb.

Could there have been a more perfect guarantee of personal liberty? And were not these the anchor-sheet of the old Ship of State, as she put out on her governmental career? Nearly a century has elapsed since those great principles were enunciated; but we find that, notwithstanding the rude tempests and billows of war, they are as firm and as fixed in all their bearings as on the Fourth of July, 1776. And we believe that this court, in the full majesty of the law and its power, will ever guard and preserve these, as the most sacred of American birthrights.

If it can be said, that to serve upon a jury in the community where a man lives, is not one of the rights, privileges and immunities of citizenship, then why the passage of a law prohibiting that function? If to send a citizen of high standing in the community out of a court of justice, in which he has the right of trial by a jury of his peers, saying to him, You shall not serve as a juror in the courts of your own State, is not

intended as a punishment and a stain upon that man's character, as much as to say, You are not worthy of confidence and respect, then, in the name of human reason and common sense, we ask, what *is* the meaning of such law?

And we submit, that if the exclusion of Andrew Park from the panel of jurors regularly drawn and summoned to try this cause in the court below, for no other reason than that he would not take the unconstitutional oath prescribed in the sixth section of the second article of the Constitution of Missouri, was not unwarranted, and an infringement of the rights of the prisoner upon trial for his life, then there is no true force and meaning in the great principles of civil liberty contained in the Constitution of the United States.

We have every reason to believe and expect that this court, in the light of that wisdom which a long life of usefulness, honor and trust has endowed, and by virtue of the decisions already pronounced in this court in the Cummings' and Garland cases, in 1866, as well as that of his Honor, Judge Strong, while upon the Supreme Bench of Pennsylvania, in the Huber case (53 Pa., 112), in 1866, in which it was held that a similar law of Congress was unconstitutional, will, by its decision, wipe out the unconstitutional features of the Missouri Constitution, and give it back to the people of that State, purged of its objectionable clauses and provisions, and in keeping with the sentiment and spirit of the old State motto: "*Salus populi suprema lex esto.*"

Then, in truth, will the plaintiff have enjoyed the full protection of the law; and it may be said of this country, as was said by one of England's greatest statesmen, after King Alfred, one of the wisest of rulers, who in one year had forty-four judges impeached before the grand council of the nation, and executed, for refusing to give his subjects the right of trial by jury: "*The soul of government lies in the jury box, to secure the impartiality of which, legislation, executive administration, and the powers of government go on.*"

BRIEF.

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I.

Under the Federal compact when the Sates entered the Union, no powers were reserved to the States which in the regulation of their own internal government, would disturb or infringe upon any one of the safeguards of civil liberty incorporated in the Constitution of the United States. The Constitution of the United States and all laws and treaties made in pursuance thereof, is the supreme law of the land, and the judges in every State are bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Article vi, Constitution of the United States.

II.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Article 14, of amendments to Constitution of the United States Sec. 1.

Ex parte Milligan case, 4 Wal., 4.

1 Humphries, 152.

1 New Hampshire, 199.

Huber case, 53 Pa. R., 112 and 119.

III.

Under the form of creating or prescribing a qualification or affixing a Constitution, no State can in affect inflict a punishment for a past act which was not punishable at the time it was committed.

Article 1, section 10, Constitution of United States.

Cummings vs. State of Missouri, 4 Wal., 277.

Murphy & Glover, test oath case, 41 Mo., 339.

7 Porter, Ala., 293.

3 Cowen, 686.

IV.

The test oath provided in the sixth section of the second article of the Constitution of Missouri, and all clauses in support thereof, is in the nature of a bill of pains and penalties, and repugnant to the Constitution of the United States.

Section 10 of article 1, Constitution of United States.

Section 1 of article 14, amendment to Constitution of United States.

Cummings vs. State of Mo., 4 Wal, 277.

Murphy & Glover, test oath case, 41 Mo., 339.

V.

It deprives the citizen of voting, of holding any office of honor, profit or trust, or of performing the functions of a juror, without trial or conviction by due process of law, and against every established principle of justice.

Article 2, §§ III, VII, XI, and XIV.

VI.

The disabilities created by the Missouri Constitution must be regarded as penalties; they constitute punishment.

4 Wal., 320.

41 Mo., 362.

VII.

A bill of pains and penalties is a legislative act which declares an act a crime which was innocent when committed, and inflicts punishment without a judicial trial.

1 Bl. 46.

2 Peters, Cond. R. 322.

2 Story, § 1344.

12 Wheaton, 267.

4 Wal., 325–6.

17 Howard, 456 and 463.

11 Peters, 420.

6 Cranch, 137–8.

VIII.

The clauses in the second article of the Constitution of Missouri, in depriving the juror of his functions, impose a penalty for acts which were innocent in themselves; they assume guilt instead of innocence, thereby changing the rules of evidence and subverting the general principles of justice.

V. and VI. Amendments Constitution of the United States.

4 Wal., 277.

41 Mo., 339.

IX.

The proclamation of amnesty issued by the President of the United States, on the 25th day of December, 1868, was a full and complete pardon for all the acts specified in the third section of the second article of the Constitution of Missouri, and relieved Mr. Park from all guilt, and restored him to all his rights, privileges and immunities as a citizen.

Ex-parte Garland, 4 Wal., 333.

7 Peters, 150; 18 Howard, 307; 28 Pa., R. 297.

24 Pick, 278; Vattel on Law of Nations, 3, ch. 18, §§ 291, Book 4, § 20.

2 Blackstone, 318, Bishop's C. L., § 713.

X.

The exclusion of Andrew Park from the regular panel of jurors drawn and summoned to try the cause below, by the judge of the St. Louis Criminal Court, because he refused to take the test oath, was not a sufficient cause in law, and was a violation of the fifth, sixth and fourteenth amendments of the Constitution of the United States, and an infringement upon the right of trial by jury.

Cummings *vs.* State of Missouri, 4 Wal., 277.

Murphy and Glover test oath cases, 41 Mo., 339.

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